

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
LUFKIN DIVISION

NETFLIX, INC., )  
 )  
Plaintiff, ) Case Nos.  
 ) 9:22-cv-00031  
vs. )  
 )  
LUCAS BABIN, ) Beaumont, Texas  
 )  
Defendant. )

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TRANSCRIPT OF PLAINTIFF'S MOTION FOR TEMPORARY  
RESTRAINING ORDER AND MOTION FOR PRELIMINARY  
INJUNCTION HEARING

March 4, 2022

BEFORE THE HONORABLE MICHAEL J. TRUNCALE  
UNITED STATES DISTRICT JUDGE  
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APPEARANCES:

For the Plaintiff:

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1 Proceedings reported by stenotype. Transcript  
2 produced by computer-aided transcription.

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4 (The following proceedings were held in open  
5 court commencing at 10:25 a.m., reported as  
6 follows:)

7 (Call to Order of the Court.)

8 THE COURT: Thank you. Please be seated.

9 All right. The Court calls the case of  
10 *Netflix, Inc., v. Lucas Babin*. It's Civil Action  
11 9:22-cv-31. This is a Lufkin Division case, but we are  
12 sitting for purposes of this temporary restraining --  
13 hearing on a temporary restraining order in Beaumont.

14 And I'm going to ask counsel to identify  
15 themselves and inform the Court if you're ready to  
16 proceed.

17 MR. PRICHARD: Should I leave this cover on?  
18 You can hear me all right, your Honor?

19 THE COURT: Yes, you can. And thank you all  
20 for being here. And we have, at least for the reminder  
21 of this month, some protocols regarding COVID. But you  
22 all, if you feel comfortable in doing so, may remove  
23 your masks in the courtroom. And we are adequately  
24 distanced. And I also think that it does facilitate  
25 better communication to be able to understand what is

1 being -- everyone is saying.

2           So -- and I would also -- since some of you  
3 may not be familiar with this courtroom, the acoustics  
4 are not particularly good even for members of the jury.  
5 You can hear the sound just dissipates. So be sure and  
6 speak into the microphone so that you can be heard,  
7 okay?

8           MR. PRICHARD: Thank you, your Honor. And  
9 good morning.

10          THE COURT: Morning.

11          MR. PRICHARD: On behalf of Netflix, Inc.,  
12 my name is David Prichard with the firm of Prichard  
13 Young LLP, in San Antonio. With me today is Mr. Joshua  
14 Bennett with the Carter Arnett firm in Dallas and our  
15 client Ms. Linda Burrow. And Ms. Burrow is the director  
16 of litigation for Netflix.

17           And with the Court's permission, after  
18 counsel introduces themselves, I would turn the rostrum  
19 over to Mr. Bennett to make our argument.

20          THE COURT: All right. That's very good.

21          MR. LINDSEY: Good morning, your Honor.

22          THE COURT: Good morning.

23          MR. LINDSEY: My name is Christopher Lindsey  
24 with the Attorney General's Office, and I'm representing  
25 Lucas Babin.

1 THE COURT: All right. Very fine.

2 Mr. Lindsey, you came in from Austin; is that  
3 correct?

4 MR. LINDSEY: I did.

5 THE COURT: All right. It's a bit unusual --  
6 in fact, I think this may be the first time in a motion  
7 for temporary restraining order that the defendant is  
8 here. Usually, as you know, those -- these matters are  
9 legally ex parte -- legally done, but I'm glad to have  
10 you here.

11 And since we're ready to proceed,  
12 Mr. Bennett, I'll turn the floor over to you.

13 MR. BENNETT: Thank you, your Honor.

14 May it please the Court.

15 THE COURT: Yes.

16 I apologize to everyone for being a little  
17 late, but we had some late filings in this case, which,  
18 candidly, have not been fully absorbed yet. It's not a  
19 criticism at all, but normally we at least have 24 hours  
20 to absorb the pleadings before one of these type of  
21 hearings. And we had the complaint that was filed, but  
22 I didn't see the actual motion as well as the reply  
23 until this morning.

24 And I recognize that everyone's probably  
25 operating on gas fumes right now and probably -- you all

1 haven't had much sleep in putting this together, but --  
2 and so I appreciate that. And we will want to give  
3 serious consideration to all of the pleadings that have  
4 been filed.

5 I do not anticipate a ruling from the bench  
6 because we have a lot to absorb, but I think we're  
7 ready, at least enough, to proceed.

8 So go ahead, Mr. Bennett.

9 MR. BENNETT: Thank you, your Honor.

10 I'm going to start my arguments talking about  
11 a constitutional principle that's central to our system  
12 of government. And it's not the First or Fifth  
13 Amendment. It's federalism. The party that's most  
14 respected that principle in this room is Netflix. For  
15 400 days, it sat under indictment under Texas Penal Code  
16 Section 43.262 before it sought redress in state court  
17 to have that statute held unconstitutional and those  
18 charges dismissed.

19 In those intervening 400 days as that  
20 indictment came down in October of 2020, it was clear  
21 that that statute was unconstitutional on its face. It  
22 was clear that the state had no probable cause to ever  
23 issue that indictment. And we show that to your Honor  
24 in the record and in our brief. Two quick examples of  
25 the utter lack of probable cause are in two of the three

1 substantive elements that fall under Section 43.262.  
2 That's 43.262(b)(2) and (b)(3). Those two elements  
3 required, before the indictment could issue, probable  
4 cause that the film *Cuties*, a film that contains no  
5 sexual conduct or nudity of a child at any point,  
6 appealed to the prurient interest in sex.

7 For 50 years, appeals to the prurient  
8 interest in sex under the United States Supreme Court's  
9 decision in *Miller v. California* has meant one thing:  
10 The most hardcore of pornography. *Jenkins v. Georgia*  
11 makes the case. Mere nudity of the -- even nudity is  
12 not enough. It has to be hardcore. No one who watched  
13 *Cuties* could ever have thought that it appealed to the  
14 prurient interest in sex under any conceivable  
15 interpretation of that phrase from *Miller*.

16 This (b)(3) requires a showing of no serious  
17 literary, artistic, political, or other public value, to  
18 paraphrase the rest of the statute. Not just it lacks.  
19 No. Zero political, literary, or artistic value. By  
20 the time the indictment hit, no reasonable prosecutor  
21 could have concluded that the statute met that element.

22 THE COURT: Under concepts of federalism, why  
23 shouldn't the Court simply allow the state courts to  
24 handle this matter? I understand that your client was  
25 inconvenienced for 400 days and embarrassed or harmed or

1 whatever by being under indictment that long. And from  
2 what I gathered from the complaint, was -- there were  
3 issues in terms of even getting before a state district  
4 judge to have the matter resolved one way or the other.

5 Why should the -- why should the federal  
6 court now intervene?

7 MR. BENNETT: Because --

8 THE COURT: I mean, don't we have the Younger  
9 abstention doctrine in play here?

10 MR. BENNETT: And that's exactly where we're  
11 headed.

12 At some point, comity and -- and  
13 federalism -- the relationship between a national and a  
14 state government deference to state governments gives  
15 way to supremacy. Now, that point is high. And we've  
16 been more than candid. We brought the issue up to the  
17 Court. Not the state. But the reason that this Court  
18 now has jurisdiction to hear this is two reasons. One,  
19 we tried to go to federal court. What happened was --

20 THE COURT: No. You tried --

21 MR. BENNETT: I'm sorry. We tried to go to  
22 state court.

23 THE COURT: All right.

24 MR. BENNETT: We brought our challenge to  
25 state court. The statute was held facially

1 unconstitutional in *Ex Parte Lowry*. We brought that to  
2 the state's attention and asked for the dismissal of the  
3 charges. When the state didn't move on that dismissal,  
4 we sought redress from the state court by filing our  
5 pretrial habeas petition.

6 THE COURT: Now, on March 2nd, the *Lowry* --  
7 the Court granted petition for -- in that case. So  
8 should the Court still -- should this Court still  
9 consider that the law of -- the law of Texas, or should  
10 we wait until the higher court in the state system  
11 renders an opinion on the true meaning of *Lowry*?

12 MR. BENNETT: Well, the First Amendment is a  
13 federal concern, and the First Amendment is squarely at  
14 issue in *Lowry*. So this Court is well within its  
15 jurisdiction -- has mandatory jurisdiction over any  
16 First Amendment claim that falls within its federal  
17 question jurisdiction subject to *Younger*. And  
18 we'll get -- and that's where I'm --

19 THE COURT: Without waiting for what the  
20 *Lowry* --

21 MR. BENNETT: Correct.

22 THE COURT: Whether or not *Lowry* is  
23 something -- a case I should follow or not?

24 MR. BENNETT: Correct. Federal law --

25 THE COURT: Although since it favors your



1 position, you want me to take note of it, I'm sure.

2 MR. BENNETT: It colors the facts of what  
3 happened post-*Lowry*.

4 THE COURT: Okay.

5 MR. BENNETT: So we file our petition. We  
6 were more than happy and ready to proceed in state court  
7 on those grievances.

8 THE COURT: Are you saying that you kind of  
9 waited for -- you were the attorney of record in *Lowry*,  
10 as I recall; is that correct?

11 MR. BENNETT: I was not, your Honor. It was  
12 a different attorney.

13 THE COURT: Okay. But you -- with that in  
14 mind, you were thinking that because of *Lowry*, that  
15 might change the tune of the district attorney in this  
16 case?

17 MR. BENNETT: Well, we hoped that that would  
18 be the case.

19 THE COURT: Okay.

20 MR. BENNETT: But even if not, certainly  
21 that's a good decision to have when you're going to move  
22 in state court --

23 THE COURT: Right.

24 MR. BENNETT: -- for a pretrial habeas  
25 relief.

1 THE COURT: I got it.

2 MR. BENNETT: The outcome of a case that's  
3 held the statute under which you're under felony  
4 indictment is invalid.

5 THE COURT: Okay. Continue.

6 MR. BENNETT: So we were more than eager to  
7 proceed in state court and try. What happened was  
8 instead -- and we saw this this morning in the state's  
9 response -- rather than dismiss the charges in October  
10 or November or December or the months that ensued until  
11 March 2nd when we were alerted to the four new  
12 indictments, the state pushed off our hearing. They  
13 didn't want it heard on January 4th when the Court was  
14 available, so it could convene a grand jury and garner  
15 four new indictments on trumped-up charges of child  
16 pornography.

17 Now, a pause here, again, just to talk about  
18 the facts. Let's remember the indictment came down --  
19 was issued and published by the state in September  
20 of 2020. *Cuties* had been streaming on Netflix by that  
21 point for about three weeks. Not a second of that  
22 footage in that film changed between September of 2020  
23 and March 3rd of 2022. At any time in that intervening  
24 period, the state could have -- it could have brought  
25 those charges originally, given the fact that Mr. Babin

1 claims to have watched the film.

2 And I think it strains credibility credulity  
3 to think that the prosecutor, who watched the film that  
4 actually thought in September of 2020 that that  
5 constituted child pornography under 43.25 of the Texas  
6 Penal Code, wouldn't charge that statute. You can look  
7 at the indictment. It's Exhibit 2 to both our complaint  
8 and our -- our TR0 motion. It doesn't mention 43.25 in  
9 the first indictment or any of the facts that would give  
10 rise to a 43.25 violation.

11 What was charged there is -- was the lewd  
12 exhibition of clothed and partially clothed children.  
13 That's what 43.262 talks about. There's -- that is why  
14 the indictment came down as it did, again, setting aside  
15 issues of probable cause. Netflix proceeded to  
16 challenge that statute in state court until Mr. Babin  
17 embarked on a plan to make sure that we didn't get  
18 relief, which was issue the four new indictments and  
19 then dismiss the charges under 43.262 to ensure that we  
20 couldn't challenge that statute and its facial  
21 unconstitutionality in state court.

22 And then they've come this morning to your  
23 Honor -- Document 9 that was filed this morning -- to  
24 tell this Court that we can't get -- even though they've  
25 dismissed those charges under 43.262, this Court can't

1 grant any relief so long as any charges are pending in  
2 that underlying state court case. Because that was the  
3 plan all along. Once it knew that *Lowry* had come down,  
4 once it knew it couldn't prevail in justifying  
5 Section 43.262 under the First Amendment, that was the  
6 plan. Bring new charges, dismiss the old, keep them --  
7 prevent them from getting relief -- prevent Netflix from  
8 getting relief under -- relief from under the indictment  
9 under 43.262, dismiss the charges without prejudice  
10 while vouching for the constitutionality of the -- of  
11 the first indictment statute. That's the motion to  
12 dismiss that's attached to the TRO.

13 THE COURT: Question.

14 MR. BENNETT: Yes.

15 THE COURT: Does it -- does the fact that --  
16 with regard to the 262 claims for which you are under  
17 indictment -- your client was under indictment for for  
18 400 days -- those -- that indictment has been dismissed  
19 without prejudice, but -- this is a standing question.

20 Is there still some speculation that -- is it  
21 more speculative that you might be indicted under --  
22 under this statute again? In other words, are we now  
23 just -- should focus on the child pornography charge  
24 that you're currently under indictment -- your client is  
25 currently under indictment for?

1 MR. BENNETT: So the answer to that is, no,  
2 it's still a live controversy that isn't mooted by the  
3 dismissal of the prior charges. We'll brief this, I'm  
4 sure --

5 THE COURT: Why is this not speculative is my  
6 question?

7 MR. BENNETT: Right. It's not speculative  
8 because once an indictment has come, even if it is  
9 voluntarily dismissed --

10 THE COURT: Right.

11 MR. BENNETT: -- the -- the chances of  
12 re-indictment are not speculative any more under  
13 Fifth Circuit cases -- and we're happy to file a letter  
14 brief immediately after or a supplemental brief for your  
15 Honor immediately after the hearing addressing that.  
16 Mootness hasn't been raised, but it's not speculative.

17 THE COURT: Yes.

18 MR. BENNETT: Because once you've been under  
19 indictment, even if the state voluntarily dismisses it,  
20 unless there is some dismissal with prejudice or some  
21 stipulation of "we won't re-indict," which is exactly  
22 the opposite in this case, then the -- the plaintiff has  
23 standing in a live controversy, not a moot one, to  
24 proceed in federal court and adjudicate its  
25 constitutional rights. So that's this case.

1           The dismissal was without prejudice -- and  
2 not just without prejudice -- while also vouching for  
3 the constitutionality of the statute -- affirmative  
4 assertions that the state really thinks the state --  
5 that the statute is constitutional. And that's where I  
6 want to come back to *Ex Parte Lowry*. It's the state who  
7 petitioned for review. It's taking up for this statute.  
8 The Attorney General's Office. Mr. Babin is the  
9 district attorney. So, apparently, the state still  
10 thinks it's constitutional. And in light of all of the  
11 those facts, it's not speculative for Netflix to think  
12 that if re-indict is not coming from -- from Mr. Babin,  
13 then some other district attorney or state attorney  
14 general.

15           THE COURT: Can this matter be decided by  
16 this Court just based upon application of the statute  
17 without having to go to a constitutional analysis?

18           MR. BENNETT: The short answer is no. The  
19 constitutional challenge is --

20           THE COURT: Well, hold on.

21           MR. BENNETT: Yes.

22           THE COURT: Of course, not in a TR0. But  
23 ultimately in an injunctive proceeding, could there be a  
24 finding? I've not seen the film, but a finding that  
25 it -- you've made the position that it doesn't violate

1 either one of these two statutes just on its face.

2 There is no act -- no evidence of sexual activity. I  
3 don't know if there is or not, but that's what you've  
4 stated.

5 I mean, could it be a determination without  
6 even addressing the broader constitutional issues and  
7 say, well, those statutes have not been violated?

8 MR. BENNETT: The short answer is no for two  
9 reasons.

10 THE COURT: Go ahead.

11 MR. BENNETT: One, the underlying merits of  
12 the indictment are a matter of only state law that's not  
13 before the Court.

14 THE COURT: Thank you. Okay. That's what I  
15 was driving at.

16 Okay. Go ahead.

17 MR. BENNETT: But the reason that those facts  
18 matter about the utter lack of probable cause for the  
19 first indictment or the new ones is because they get  
20 back to what -- what we wanted to talk about since we  
21 got here, which is Younger abstention.

22 So Younger abstention -- just speaking  
23 critically -- just strictly about the law of Younger  
24 abstention, it applies in -- when there's three elements  
25 present. One, ongoing state court proceedings. Two,

1 when the federal action might interfere with those  
2 proceedings. And, three, if the movant or the plaintiff  
3 can seek redress in state court. Counts 1 and 2 of the  
4 complaint -- of Netflix's complaint for injunctive  
5 relief do not fall under Younger abstention, despite  
6 what the state argued this morning in its brief.

7 And the reason for that is because upon  
8 dismissal of the charges under 43.262, there is no state  
9 court proceeding that involves those charges. In that  
10 case, our invocation of federal question jurisdiction  
11 makes the exercise of jurisdiction over Counts 1 and 2  
12 mandatory because we have a right to a federal forum to  
13 adjudicate federal claims under the United States  
14 Constitution.

15 THE COURT: Okay.

16 MR. BENNETT: Younger abstention does not  
17 apply at all, despite what the state has argued, despite  
18 what the state has tried to do to prevent us from  
19 getting here. It doesn't apply to Counts 1 and 2. So  
20 those go forward. So we get to challenge in this court  
21 and adjudicate the constitutionality of Section 43.262  
22 because it's a federal question. It's not barred by  
23 Younger abstention, and it is still a live controversy.

24 Counts 3 and 4, even if the Court assumes all  
25 of the Younger abstention facts -- the three Younger



1 abstention elements applies to those two counts, which  
2 is those that arise out of the new -- the four new  
3 indictments, this is where we switch from comity to  
4 supremacy. At some point, federal law hold sway.  
5 Constitutional law hold sway. And that point is shown  
6 emphatically in this record, and that is where state  
7 officials have engaged in bad faith tactics. And we  
8 don't use that term lightly. That's a well-supported  
9 finding under the cases we've cited to this Court;  
10 *Fitzgerald v. Peek*, 636 F.2d 943; *Jordan v. Reis*,  
11 169 F.Supp 2d 664. There are others. *Torries v.*  
12 *Hebert*, 111 F.Supp 2d 806.

13 In all of those cases, the federal courts  
14 refused to apply Younger abstention, an equitable  
15 doctrine, because it had been shown that the state  
16 officials acted inequitably toward the plaintiffs in  
17 trying to retaliate against them or harass them for  
18 exercising their First Amendment rights. And those  
19 facts are present here, and under the law, justify the  
20 exercise of this Court's federal question jurisdiction  
21 over federal constitutional issues.

22 So, for example, Netflix exercised its  
23 First Amendment right to promote the film *Cuties*. As a  
24 result of the exercise, that is protected conduct. The  
25 film *Cuties* -- and we've showed this in our brief -- is

1 not subject to obscenity and under no reasonable  
2 construction of a child pornography law could it be  
3 considered child pornography. And, in fact, to stretch  
4 child pornography law, such as Texas Penal Code 43.25,  
5 to apply to this movie is to stretch them beyond  
6 constitutional bounds. On that point, the state's  
7 position apparently is that anyone who not -- not only  
8 who watches *Cuties* is guilty of a second degree felony,  
9 but anybody who promotes *Cuties* -- and that is an  
10 exceedingly broad term as defined in the statute.  
11 Promotion could include anyone who posts a positive film  
12 review of *Cuties* urging other people to watch it.

13           If this is really child pornography -- real  
14 child pornography, nobody can post up on YouTube, "This  
15 is a great movie. You should watch it. Here's the  
16 link." Or on Internet Movie Database or on any number  
17 of social media sites where people exchange these kinds  
18 of ideas and communications. But the state would  
19 have -- would construe Section 43.25 to apply to all of  
20 that. Because in the real child pornography context,  
21 all of that would be criminal if it were really child  
22 pornography.

23           THE COURT: And none of that is specifically  
24 before the Court, but you're just using that for  
25 purposes of argument?

1 MR. BENNETT: It is before the Court in the  
2 sense of our as-applied challenge to Section 43.25. As  
3 applied to *Cuties*, all of those facts show why it is  
4 unconstitutional as applied to us. It covers -- it --  
5 as applied versus a facial challenge concerns the  
6 remedy. Netflix supports and is not trying to  
7 invalidate Section 43.25. We are cognizant of its good.  
8 We support it. We are very conscientious in making sure  
9 nobody violates that certainly from our side in doing  
10 our due diligence. And we've shown that to the Court in  
11 Exhibit 4 to our temporary restraining order showing  
12 that we did an investigation about the actresses  
13 involved in our film and verified that they were of age  
14 if the conduct required that that verification be made.

15 THE COURT: When was this -- when was this  
16 film made, and in particular what -- do you know the  
17 date that that particular scene with Ms. Aillaud -- I  
18 may be not pronouncing it correctly -- Manola I think is  
19 her first name.

20 Do you know the date that that particular  
21 segment was filmed?

22 MR. BENNETT: To the best of -- and this is  
23 not in the record yet. To the best of our knowledge, it  
24 was no -- no sooner than 2018. Certainly, it wasn't  
25 2017 or 2016 when she would have been underage.

1 THE COURT: 2018?

2 MR. BENNETT: Correct. So she was born in  
3 1999. Our best -- to the best of our knowledge, she was  
4 probably 19 or 20.

5 THE COURT: Okay.

6 MR. BENNETT: We're still trying to run that  
7 down. It certainly wasn't filmed in 2016 when she was  
8 17 years old.

9 THE COURT: You can represent that to the  
10 Court?

11 MR. BENNETT: Yes.

12 THE COURT: Okay. Go ahead.

13 MR. BENNETT: So we are very conscientious  
14 and cognizant of that because Netflix streams  
15 everywhere. It has to stream -- it's subject not only  
16 to federal laws on this issue, but 50 state laws on this  
17 issue. And it streams *Cuties* into every one of those  
18 states.

19 And I just want to step back and pause this  
20 just for a moment to think about what that means.  
21 Federal child pornography law is overseen by 94  
22 United States attorneys and their assistant United  
23 States attorneys. There are 50 state attorney generals  
24 and their assistant attorney generals. And I don't know  
25 how many district attorneys there are in the United

1 States, but it has to be a few hundred.

2 In Texas, there are 241 district attorneys.  
3 *Cuties* has been streaming continuously from September  
4 of 2020 until now. And out of all of those thousands of  
5 prosecutors, one -- one has brought indictments against  
6 Netflix for the film *Cuties*. One. And not just one --

7 THE COURT: One federal -- one federal  
8 prosecutor has, did you say?

9 MR. BENNETT: No. One prosecutor out of all  
10 federal prosecutors and all state prosecutors in  
11 America --

12 THE COURT: Mr. Babin.

13 MR. BENNETT: Mr. Babin. And not just one,  
14 but five. I think, again, that highlights the nature of  
15 why 43.25 can't constitutionally be stretched to apply  
16 to *Cuties*. Because it's -- it's too far.

17 THE COURT: Okay.

18 MR. BENNETT: And we commend to your Honor  
19 the case *U.S. v. Williams*. We've cited it in our brief  
20 about exactly why that's the case. Justice Scalia in  
21 his opinion there rejected as far-fetched the very view  
22 Mr. Babin expresses in this court about why 43.25  
23 applies. That -- he shot that down in rejecting a  
24 facial challenge but said as-applied challenges could be  
25 brought. And that's why we're here.

1           So when it comes to Younger -- even Younger  
2 has limits. And we have been candid from the start. We  
3 put it in our complaint, and it's, again, in our TRO  
4 motion that we understand that Younger's limits are a  
5 high bar. But the sad part is that the law and the  
6 facts of this case exceed that bar. And the cases we've  
7 cited to your Honor show it. *Torries* is a great one.  
8 In that case out of a federal court in Louisiana, some  
9 plaintiffs had been playing rap music. Gangster rap  
10 music. They have a First Amendment right to do that.

11           The local district attorney didn't appreciate  
12 it. He was concerned that gangster rap was inciting  
13 violence and brought criminal charges against the  
14 plaintiffs in that case for playing their music.  
15 Younger abstention was asserted there by the district  
16 attorney, and the Court rejected the Younger abstention  
17 motion because the law and the facts didn't justify it.  
18 If the plaintiffs had a First Amendment right to play  
19 the gangster rap music, the Court held, and you have no  
20 other basis for justifying the indictment other than  
21 their exercise of a First Amendment right, then that's a  
22 bad faith prosecution, among the other facts that the  
23 district attorney couldn't come up with any other  
24 justification, other than the exercise of First  
25 Amendment rights, to defend the prosecution.

1           We have -- our -- before it was dismissed --  
2 the charges under 262 were dismissed, our habeas  
3 petition had been pending for more than 90 days. And we  
4 have yet to hear any defense from Mr. Babin or anyone  
5 else about why that statute isn't unconstitutionally  
6 overbroad or unconstitutionally vague on its face.

7           THE COURT: That habeas motion is now moot  
8 because those charges were dismissed, correct?

9           MR. BENNETT: Correct. But the point I'm  
10 making is there's been -- there has never been a  
11 substantive defense to what has happened here.

12           So once we have all those facts in view,  
13 Younger abstention either doesn't apply at all under  
14 Counts 1 and 2, or if it does apply to Counts 3 and 4,  
15 it would be inappropriate to apply Younger abstention  
16 given the facts of the case and under the law of Younger  
17 abstention exceptions. I want to also point out, again,  
18 another exception to Younger abstention is where the  
19 state acts purposely to deprive a plaintiff of a legal  
20 right or acts in retaliation of that legal right.

21           And the record shows that happened here. The  
22 legal right that we invoked was the right to petition  
23 the government for redress. We asked for dismissal of  
24 charges that couldn't be supported either by the  
25 constitution or the facts. The facts were coming later,

1 but we couldn't even get over the constitutional hurdle,  
2 which is why we filed the pretrial habeas petition.  
3 That petition was filed on November 12th. By that  
4 point, the case had been pending 400 days roughly. At  
5 no point thereafter did a dismissal come until  
6 March 3rd. And the reason the dismissal came that late  
7 and -- was because we filed that petition. Showed  
8 ourselves entitled to a judgment. And not just a  
9 judgment that -- that would have got us out of some  
10 criminal charges, but a judgment that would have  
11 invalidated that statute against Netflix for all time  
12 and in memoriam, if successful. And maybe it would be  
13 appealed, but we would defend that on appeal. But that  
14 was the redress we showed ourselves entitled to.

15           It wasn't until after we filed that petition  
16 and expressed those views and showed ourselves entitled  
17 to that relief that Mr. Babin engaged in the course of  
18 conduct that he engaged in; convene a secret grand jury,  
19 get four more trumped-up charges, and dismiss those --  
20 dismiss the first indictment so we could never get that  
21 kind of relief. *Jordan v. Reis* and some other cases  
22 that we've cited show that when you act -- when you file  
23 claims -- when you petition the government and that  
24 results in further conduct -- prejudicial conduct by the  
25 government, that's an exception to Younger abstention



1 also.

2           So with Younger abstention out of the way, we  
3 can finally get to the merits of why we're here, and  
4 that's the state and Mr. Babin's effort to deprive  
5 Netflix of its constitutional rights. At no point in  
6 the state's response this morning do they try to engage  
7 those arguments on the merits. They haven't done it in  
8 the 90 days that ensued after we filed the petition.  
9 They don't even mention the film *Cuties* in the response  
10 or provide any analysis to rebut any of the arguments we  
11 make about why it is unconstitutional -- why the new  
12 indictments are unconstitutional as applied to Netflix  
13 and *Cuties*, and they make no effort to defend -- don't  
14 even cite Section 43.262 in their response. And that, I  
15 would submit, is because there isn't much of one.  
16 Between its unconstitutional vagueness and its clear  
17 overbreadth and viewpoint discrimination, as we also  
18 point out in our brief, the statute can't survive strict  
19 scrutiny on its face. That being Section 43.262.

20           So Netflix is likely to succeed on the merits  
21 of its claims. And you know that especially because of  
22 *Lowry*. And to your Honor's point about the Texas Court  
23 of Criminal Appeals granting the petition for review --  
24 something we pointed out in Footnote 1 of our  
25 complaint -- I would submit to your Honor that -- and

1 this is just tea leaves. One of the reasons for that is  
2 this is the underlying case in state court. The Texas  
3 Court of Criminal Appeals certainly didn't know that the  
4 day it granted review in that case, Mr. Babin  
5 indicted -- dismissed that indictment. But you can look  
6 at *Lowry* on Page 11 of the opinion in *Lowry* where that  
7 court cites Mr. Babin's indictment of Netflix as grounds  
8 for finding the statute that Mr. Lowry challenged,  
9 43.262, unconstitutional.

10 It cited the very prosecution that Mr. Babin  
11 brought as a reason to find it overbroad and threatening  
12 and chilling speech. And none of that mattered to  
13 Mr. Babin.

14 THE COURT: Now, the *Lowry* decision was not  
15 based on Section 43.262, though.

16 MR. BENNETT: It was not. That is correct.  
17 And that's because -- and this is, again, I think  
18 another fact that sort of shades what's really going on  
19 here with respect to these four new indictments. We  
20 have attached our habeas petition as Exhibit 5 to our  
21 complaint and as Exhibit 6 to our TRO motion. In that  
22 petition, we were very candid with the Court because we  
23 take that obligation seriously. And what we've said was  
24 the existing laws on the books of -- the statutes in  
25 Texas under child pornography are constitutional on

1 their face.

2           We made that representation to the Court so  
3 as to distinguish the newer 43.262, which would -- had  
4 been enacted in 2017. And the reason that fact matters  
5 is because once we've told the state court that we can't  
6 make a facial challenge to 43.25, we can't get pretrial  
7 habeas relief against those charges. We have to go  
8 through all of the pretrial process under any charges  
9 under 43.25 because there's no right to pretrial habeas  
10 relief under Texas state law unless you have a facial  
11 challenge. And we readily acknowledge we don't. And so  
12 that's why the -- that's why we traded horses. You can  
13 get pretrial relief and a right to immediate appeal on a  
14 facial challenge, and we were headed that way to make  
15 sure we didn't. And we had to play his game in state  
16 court. He changed to 43.25. And in a way -- again,  
17 that's lacking probable cause, which goes to bad faith,  
18 but more importantly cannot be supported by the  
19 constitution --

20           THE COURT: So you don't have a  
21 constitutional attack on Section 43.25?

22           MR. BENNETT: I do as applied. So the  
23 difference is 43.262 being a facial challenge would  
24 invalidate that statute for everyone. No prosecutor in  
25 Texas could ever indict anyone if we were successful

1 under 43.262.

2 THE COURT: Because you're saying it's too  
3 vague and that kind of thing?

4 MR. BENNETT: Exactly. In substantially all  
5 of its applications.

6 THE COURT: Okay.

7 MR. BENNETT: So it's too vague for everyone.  
8 It's invalid for everyone under the First Amendment.

9 THE COURT: Okay.

10 MR. BENNETT: We can't make that challenge  
11 under 43.25 because it -- because Texas correctly  
12 drafted that statute to comply with *Ferber v. New York*.  
13 And we, again, in our habeas petition told Mr. Babin  
14 that that was our position because it's true. It does.  
15 It's facially constitutional. We would never think of  
16 trying to bring a facial challenge to a statute that --  
17 that's that important to the State of Texas and that  
18 many other states have.

19 THE COURT: All right. So if the  
20 Statute 43.25 is facially valid, then in its  
21 application, your position is that it simply doesn't  
22 apply here because there is no sexual conduct,  
23 essentially, portrayed in the film. At least that's  
24 what you've represented to the Court.

25 MR. BENNETT: Correct. So there's --

1 there's -- for constitutional purposes --

2 THE COURT: So then how do I -- it kind of  
3 goes back to my first question.

4 Do I -- could I on this particular point make  
5 a decision based upon the applicability of the statute  
6 itself as it applies to this film, which I have not  
7 seen. And if I were to do that, then am I not  
8 interfering with reaching down and basically  
9 invalidating the state process through the state courts  
10 before the state courts have even had an opportunity to  
11 rule on whether or not there's been a violation of this  
12 statute?

13 MR. BENNETT: So the answer -- the short  
14 answer is no. And let me explain why. There's --  
15 there's two sets of facts here that are important for  
16 this case because of it's highly unusual nature, which  
17 your Honor alluded to at the start. So one set of facts  
18 concern the constitutional claim. That's the -- that's  
19 the only claim that's before the Court on the merits.

20 Can Section 43.25 be constitutionally  
21 applied -- be applied to the film *Cuties* consistent with  
22 the First Amendment? That's the issue we've raised.

23 THE COURT: Okay.

24 MR. BENNETT: That's the only issue that's  
25 before the Court on that -- under the new indictments

1 under 43.25. The reason that the merits come into play  
2 here is because of the state's anticipated invocation of  
3 Younger abstention. Now, what I mean by that is when  
4 a -- when the state or a state official pursues charges  
5 under which it has no hope of obtaining a conviction --

6 THE COURT: Okay.

7 MR. BENNETT: That's evidence of bad faith  
8 that goes to whether the equitable doctrine of the  
9 Younger abstention should apply and prevent the Court  
10 from reaching issues that it otherwise has original  
11 mandatory jurisdiction to reach. So when we talk about  
12 the lack of merit -- the utter lack of merit that 43.25  
13 as applied to *Cuties* poses, that doesn't go to the  
14 issues necessarily the Court needs to decide in term of  
15 the merits. What it goes to is Mr. Babin's utter bad  
16 faith.

17 So because no reasonable prosecutor who  
18 watched *Cuties* -- as, again, corroborated by the utter  
19 non-indictment by any other prosecutor in America under  
20 any form of child pornography law -- that goes to bad  
21 faith. But when we get to the other side, which is  
22 the side -- the other side of this issue, which is the  
23 merit of it, as applied to *Cuties*, 43.25, that can't  
24 go forward because it's unconstitutional under the  
25 First Amendment.

1           So your Honor's not invading the state -- you  
2 don't need to reach whether -- the issues of whether the  
3 statute applies or, you know, would -- do we need to let  
4 the state adjudicate the merits of --

5           THE COURT: And so I'm clear, if, in fact, we  
6 had actual sexual conduct of minor children portrayed in  
7 the film, then there would you no constitutional -- that  
8 would be pornography under the federal constitutional  
9 analysis, correct?

10          MR. BENNETT: If -- yes. If a film qualifies  
11 and actually has real sexual conduct as defined by Texas  
12 law and -- again, assuming that that Texas law is  
13 construed consistent with *Ferber v. New York*.

14          THE COURT: Right.

15          MR. BENNETT: In that case, it would be  
16 actual child pornography, and the indictment would be  
17 constitutional. That's correct.

18          THE COURT: Okay.

19          MR. BENNETT: But that is not what we have  
20 here.

21          THE COURT: Okay. And so that's the  
22 distinction you're drawing here?

23          MR. BENNETT: That's right. And, again, I  
24 want -- we've cited some -- some colorful examples of  
25 the profound defects in Mr. Babin's theory of applying

1 43.25 to *Cuties*. One of them is a piece that's very  
2 critical of *Cuties*, and we've cited this. It's a piece  
3 by a Mr. Naulty. If Mr. Babin's correct and *Cuties*  
4 shows real sexual conduct for purposes of Texas Penal  
5 Code law, Mr. Naulty is a felon because he put out a  
6 news story that cropped what he viewed as the most  
7 objectionable screenshots from the film and pixelated,  
8 you know, the most titillating parts -- if you're  
9 Mr. Naulty, I guess -- of -- of those screenshots,  
10 right, of the scenes from the film.

11 Under Fifth Circuit law, that's a violation  
12 of a child pornography statute. You can't pixelate  
13 images that are actually child pornography and have any  
14 sort of defense even if it's a journalistic one. That's  
15 *U.S. v. Matthews* out of the Fourth Circuit. There's no  
16 such thing as a bona fide journalistic purpose defense  
17 to child pornography laws. So if Mr. Babin's correct,  
18 Mr. Naulty's a felon under Texas Penal Code  
19 Section 43.25 or Texas Penal Code Section 43.26, which  
20 is related to 43.25. That can't be the law. That isn't  
21 the law because it -- *Cuties* is not child pornography.

22 So in light of all of that, the clear  
23 violation of the First Amendment -- that 43.25 -- would  
24 be a stretch to apply to *Cuties*. And the fact that  
25 viewed -- viewed objectively, if it can't ever be



1 construed to meet the four corners of that, the Court  
2 can reach the merits because Younger abstention doesn't  
3 apply. And, again, that -- that last part about why  
4 Younger abstention doesn't apply hinges on the  
5 definition of sexual conduct somewhat, right? Again, we  
6 commend *U.S. v. Williams* to the Court. There's also a  
7 great decision recently out of the -- out of the D.C.  
8 Circuit that sort of talks about how you treat  
9 catchalls.

10           And I guess I'd have to back up really quick  
11 here. We are making something of an assumption. If you  
12 look at the indictments, Mr. Babin doesn't actually  
13 identify what part of 43.25 -- what actually constitutes  
14 sexual conduct. He just says it's in there. If you  
15 look at the definition of sexual conduct, there's a lot  
16 of explicit sexual acts listed there. And none of  
17 them -- and I won't repeat them here. I probably can't  
18 remember them all, but there -- they're serious, they're  
19 explicit, and none of them are present in the film.

20           Our best guess -- and it literally is a  
21 guess -- is that the state thinks that it amounts to the  
22 lewd exhibition of the genitals. And that word means  
23 something. And this is where we go back to 43.262,  
24 which is the charges he first brought. Genitals is not  
25 the pubic area. And the Texas legislature agrees with

1 that because it uses distinct terms --

2 THE COURT: Or --

3 MR. BENNETT: It uses distinct terms to make  
4 that point in Section 262. So there are no genitals  
5 visible at any point in *Cuties*.

6 THE COURT: What does the word "depict" mean  
7 in the statute?

8 MR. BENNETT: Depict just means show under  
9 its plain language. It's not a defined term, but, you  
10 know, you could use the New Oxford International  
11 Dictionary. And that's what it means. Depict means to  
12 show. To portray.

13 THE COURT: So if one were to show a  
14 photograph of the area of a child, say, below the belt  
15 line but clothed -- so of the pubic area -- but that's  
16 not depicting or is it depicting the pubic area? It's  
17 the -- do you see what I'm saying?

18 MR. BENNETT: I do. There is a distinction  
19 between the two terms. And this is where we would  
20 commend *U.S. v. Williams* and --

21 THE COURT: Especially when that Statute 262  
22 talks about clothed or partially clothed.

23 MR. BENNETT: Right. Pubic area means pubic  
24 area. It's a more generalized region. It could be  
25 front or back or clothed or unclothed.

1           THE COURT: But could that, even if clothed,  
2 create some sexual interest -- prurient interest just by  
3 watching it whether the -- even if it is clothed --  
4 perhaps, even depending upon how the clothes are tight  
5 on the body or something else?

6           MR. BENNETT: I don't know whether it could  
7 create sexual interest. I guess it depends on who you  
8 are, but that's not the focus of the statute. The focus  
9 of the statute -- when we look at catchall  
10 clauses like lewd exhibition -- and this is the point  
11 that Justice Scalia drives home in *U.S. v. Williams*.  
12 You interpret a catchall by its predecessors, right?  
13 You don't take it in isolation. A catchall is  
14 interpreted under the canons of construction by its  
15 predecessors.

16           And if you look at those predecessors and how  
17 explicit those acts are and then you read "or the lewd  
18 exhibition of the genitals" -- and then it continues  
19 on -- other anatomical parts. And it uses those  
20 anatomical parts, not in any general sense, but in their  
21 anatomical sense, such --

22           THE COURT: Okay.

23           MR. BENNETT: -- that you have to show those  
24 anatomical parts.

25           THE COURT: I suppose I ultimately will have

1 to look at the film. And I know there is an issue  
2 involving the exhibition of the -- what is commonly  
3 referred to as the areola of a woman's breast.

4 MR. BENNETT: Correct.

5 THE COURT: And that's what then makes that  
6 potentially a violation of the statute. Although I  
7 understand your position is this lady was over the age  
8 of 18 at the time it was filmed and obviously at the  
9 time this movie was shown to the public.

10 But is it covered or uncovered? Is that a  
11 bright line that we need to look for when we're looking  
12 through this?

13 MR. BENNETT: It is an uncovered moment.  
14 The --

15 THE COURT: No. No. But to define whether  
16 or not it would violate either of these two statutes.

17 MR. BENNETT: So I think -- if I understand  
18 your Honor's question correctly, if you're asking does  
19 it -- does it -- do child pornography laws require  
20 nudity in every case?

21 THE COURT: That's what I'm asking.

22 MR. BENNETT: No. The answer -- the simple  
23 answer is no. But that's not saying that just because  
24 clothing is involved that it is child pornography. And  
25 that gets back to what -- the point I was making earlier

1 about what a catchall does. You have to interpret a  
2 catchall by its predecessors.

3 And so if clothing is involved, that's -- if  
4 it's present, that doesn't -- you've got to look at in  
5 what way. And this is where we get back to *Williams* and  
6 *Hillie*, which is if there is not nudity, it is a very  
7 close question. But whatever the question is, it's got  
8 to look like real sexual conduct. And that's an outlier  
9 issue that we don't have to get to, and that's not  
10 raised by this case. And your Honor will have to watch  
11 the film to see what I mean by that, but it's not sexual  
12 conduct.

13 It doesn't imitate or look like or touch on  
14 any of the predecessors in the statute. And, again, I  
15 want to emphasize you know that because this is -- this  
16 is an indictment of one. No federal, no state, or any  
17 prosecutor, other than Mr. Babin, has brought these  
18 charges despite the fact that for two years it  
19 streamed -- for almost two years it streamed  
20 continuously on Netflix.

21 We've provided those arguments to your Honor  
22 about why it would be unconstitutional to stretch it  
23 here. And, again, that's the part of Justice Scalia's  
24 opinion in *U.S. v. Williams* that addresses this issue  
25 that just fleeting or, you know -- even if it's lewd is

1 not enough. It's got to be sexually explicit conduct.  
2 And none of that's in this film.

3 So as -- as Mr. Babin tries to pursue these  
4 charges in violation of *Cuties'* First Amendment rights,  
5 it creates an as-applied First Amendment violation. And  
6 we're likely to prevail on that for all the reasons  
7 we've shown in our motion for TR0 and preliminary  
8 injunction. So moving beyond the likelihood --

9 THE COURT: I want to talk a little bit about  
10 the irreparable harm.

11 MR. BENNETT: Sure.

12 THE COURT: It's a conviction -- it's not a  
13 conviction of the specific executives of Netflix that  
14 they're seeking. It's a conviction of a corporation,  
15 which admittedly might -- I don't know -- hamper or  
16 endanger the reputation of the company or something like  
17 that, I suppose. But, practical matter, what happens if  
18 a corporation is found guilty of a crime?

19 MR. BENNETT: So under --

20 THE COURT: What is the harm?

21 MR. BENNETT: So there's the practical piece,  
22 which is what actually happens if there's a conviction,  
23 and then what's the irreparable harm. Taking the  
24 practical piece first, under Texas law, there's fines  
25 involved for a corporation and obviously the label of

1 child pornographer and felon, which carries weighty  
2 consequences in our society. And not just for -- to be  
3 convicted of that, to be accused of that --

4 THE COURT: Would it also then, perhaps, be a  
5 chilling effect on the company or, for that matter, any  
6 of their competitors in deciding whether or not to put a  
7 film on their streaming network or maybe a television  
8 station from showing a film or something of that nature?

9 MR. BENNETT: Yeah. And that gets to the  
10 side that I was about to shift to, which is the  
11 irreparable harm side. A company -- it's not just  
12 Netflix that suffers irreparable harm. And this maybe  
13 ties in a little bit with the public interest.

14 As Netflix is faced with felony indictment  
15 for, first, lewd exhibition of visual materials  
16 depicting a child under 262, but now child pornography,  
17 it has to make weighty decisions. And we've pointed  
18 this out in our brief under Subsection 2, Part B where  
19 it has to weigh can it put these kinds -- it has a  
20 First Amendment right to do it. *Cuties* is protected by  
21 the First Amendment because it's neither obscene nor  
22 child pornography, again, under any sensible  
23 construction consistent with the constitution.

24 So then it has to be put on the horns of a  
25 dilemma to sacrifice its First Amendment rights, but

1 also the First Amendment rights of Netflix's subscribers  
2 to watch and view those kinds of materials. And if this  
3 is -- and this gets to the overbreadth somewhat. If  
4 this production qualifies as child pornography in Texas  
5 under 43.25, there's an awful lot of stuff on the  
6 internet that immediately qualifies for the same felony  
7 label. YouTube, Instagram, and TikTok. We have it in  
8 an appendix that we provided to the Court. It's  
9 attached to our habeas petition. It's Exhibit 5 or 6 to  
10 the complaint or the TR0. There is a vast amount of  
11 materials that exceed anything shown in *Cuties* but  
12 certainly don't encroach the actual line of child  
13 pornography that millions of people would suddenly  
14 become felons for sharing, viewing, discussing.

15           The irreparable harm is profound. Any time  
16 the government brings criminal charges against any  
17 person, whether that person's an individual or a  
18 corporation, exceeds its constitutional authority to  
19 take that kind of weighty, oppressive action is  
20 irreparable harm as a matter of law.

21           THE COURT: Give me an example of a scene if  
22 inserted in this movie that might make it a violation of  
23 43.25? What would it take to push it over the edge?

24           MR. BENNETT: So -- I mean, the easy ones are  
25 if it's something prior to the predecessor -- those are



1 easy, right? Actual sex, simulated sex. And that's a  
2 very, like, defined -- it is a very defined term that  
3 means it looks like two people -- two minors or an adult  
4 and a minor having relations. Those are the easy ones.

5           When it comes to lewd exhibition, it gets a  
6 little more spread out. But any lewd exhibition, such  
7 as the one in *Williams*, would -- that actually shows  
8 real sexual conduct -- that butts up against but maybe  
9 doesn't quite actually go toward lewd exhibition's  
10 predecessors would be that kind of thing. So -- I have  
11 to confess that I can't --

12           THE COURT: Right.

13           MR. BENNETT: I don't watch, you know, a lot  
14 of explicit things, so maybe I lack imagination. But  
15 there are cases out there that your Honor can look at.  
16 *Williams* is a good example.

17           THE COURT: Well, it's been said that  
18 pornography is something you know when you see it, but  
19 maybe that's not exactly a very clear defined standard.

20           MR. BENNETT: Well, it's certainly not. And  
21 I think there's a lot of that going on in these  
22 underlying indictments.

23           THE COURT: Right.

24           MR. BENNETT: But, luckily, that's why we  
25 have the supremacy of federal law and the -- and the --

1 what the supreme court has said is within bounds and  
2 outside of bounds. And we've discussed this at length  
3 in our brief, but *Ferber* provides all of the guidance  
4 the Court needs to know what's in and what's out when it  
5 comes to child pornography.

6 And that's if you construe a catchall too  
7 broadly -- and *Ferber* admonishes against this -- you  
8 will exceed -- child pornography is not limitless. It's  
9 not standardless. It has -- even that category, as  
10 broadly as we to need to interpret it to protect  
11 children and as broadly as Netflix does interpret it to  
12 protect children, even that has limits. And if you  
13 interpret it too broadly, you go outside those limits,  
14 and it violates the First Amendment.

15 THE COURT: You're emphasizing First  
16 Amendment, but I believe in your complaint you also make  
17 reference to the Fifth and Fourteenth Amendments.

18 Do you want to give me a nutshell  
19 articulation of those claims?

20 MR. BENNETT: Sure. So we raised a facial  
21 challenge to Section 43.262 for being unconstitutionally  
22 vague.

23 THE COURT: Right.

24 MR. BENNETT: And the reason for that is  
25 because the legislature in crafting Section 43.262

1 jumbled a number of distinct areas of law and failed to  
2 define essential terms that would give the public notice  
3 about what they need to do or not do to avoid felony  
4 prosecution by the state of -- state's agents. So, for  
5 example, the Section 43.262 includes the phrase "lewd  
6 exhibition of the genitals or pubic area," but that  
7 phrase for a lot of textual, structural, and legislative  
8 purpose reasons can't be construed to  
9 mean the same thing as lewd exhibition under  
10 Section 43.25(a).

11           And the reason for that is several. I'll  
12 just give a quick couple, and your Honor can look at our  
13 argument in Exhibit 6 if you want to -- all of the  
14 reasons, but just a few quick ones. When it comes to  
15 lewd exhibition, it's its own term in 43.262. And the  
16 reason for that is because under 43.262(a,) the  
17 legislature cites the definition of sexual conduct of  
18 which lewd exhibition is a catchall under 43.262(a).  
19 However, if you look at the operative provisions of  
20 43.262(b,) the legislature never invokes that term at  
21 any point in the criminal elements of the statute. It  
22 doesn't ever use sexual conduct.

23           What it does is it says -- it reduces the  
24 element to lewd exhibition. And we've cited to the  
25 cases, your Honor. But -- but just because words are in

1 common across two different statutes doesn't mean they  
2 should be construed the same and quite often it means  
3 they should not be. When statutes are enacted like  
4 these two have been on a -- forty years apart -- 43.25  
5 was originally enacted in 1977, and 43.262 was enacted  
6 in 2017. So, you know, that's a lot of years  
7 difference, and the purposes of the two statutes are  
8 different.

9           And just a quick example. Typically, Texas  
10 uses at least for -- for photos -- as far as I'm aware,  
11 there's not a film case that applies -- what's called  
12 the Dost factors, but Texas courts typically apply what  
13 are known as the Dost factors to define whether a  
14 picture, a still photo, constitutes the lewd exhibition  
15 of the genitals for purposes of 43.25 or .262. Dost  
16 can't apply here. And the reason for that -- to decide  
17 what lewd exhibition means for purposes of 43.262. And  
18 the reason for that is a couple of textual clues. One,  
19 the legislature used a completely different kind of  
20 wording when it came to lewd exhibition than it did in  
21 43.25(a).

22           Two, the legislature in enacting 43.262  
23 expressly eschewed Dost. In the earliest version of  
24 43.262 -- the earliest version of that statute actually  
25 listed all of what are known as the Dost factors in the

1 statutory language. There's no floor debate. We don't  
2 know why. But at some point between its introduction on  
3 the house floor and its coming out of committee for  
4 passage on the floor, all of those Dost factors were  
5 removed. And there's a really easy textual reason for  
6 that. Under Dost, the presence of clothing -- and this  
7 goes to another reason why lewd exhibition isn't present  
8 under the Section 43.25 indictments -- but clothing's a  
9 mitigating factor.

10           We've cited cases in -- not necessarily in  
11 this TR0 motion, but certainly in our habeas petition  
12 that we've attached -- where the Fifth Circuit's held  
13 that you can't convict somebody when clothing is present  
14 under the circumstances at least of that case. Because  
15 under Dost, if clothing's present, that cuts against a  
16 finding of lewd exhibition. So clothing is not a  
17 mitigating factor under 43.262. It's an incriminating  
18 factor. And so you can't construe -- given all these  
19 textual issues before we even get to the legislative  
20 purpose problem, you can't construe lewd exhibition from  
21 43.25 to mean the same thing as 43.262.

22           Now, the reason that matters for vagueness  
23 reasons is when you use a phrase like "lewd exhibition,"  
24 like *Ferber* admonished, like the Texas Court of Criminal  
25 Appeals has held at least three times, you've got to

1 provide, the public essentially, guidance about what it  
2 means.

3           You know, you can't use a phrase like "lewd  
4 exhibition" that can be so broadly construed that you  
5 don't apply -- also enact and tell executive officials  
6 what it means when they enforce it. So they can't just  
7 make it up on the fly and sort of adopt the "I know it  
8 when I see it" procedure. And when -- we've cited the  
9 cases in our petition. But when you look at those  
10 words, undefined as they are, not construed consistent  
11 with 43.25 because that would be inappropriate and would  
12 contradict the legislature's intent, you have no  
13 standard. And that in and of itself would be reason  
14 enough to find it unconstitutionally vague, but it gets  
15 worse.

16           If you look at 43.262(b)(2,) this is the  
17 oddest part of the statute. Obviously concerned that  
18 this new world about -- they were about to embark in --  
19 the legislature -- they jettisoned *Dost* and incorporated  
20 only partially *Miller v. California*'s jurisprudential  
21 benchmark touchstone requirements. There are four or  
22 five *Miller* requirements. It has to be patently  
23 offensive to the average person under community  
24 standards and all these other things. 262 has none of  
25 those. It only has two *Miller* elements, which is

1 appeals to the prurient interest in sex, which we've  
2 talked about, and lacks -- it has no serious artistic or  
3 other public value.

4           When you look at that middle element, (b)(2,)   
5 anybody who reads the statute and sees that it -- that  
6 it -- it applies to clothed or partially clothed  
7 children who lewdly exhibit -- whatever that means --  
8 their pubic area, it -- at that point that second  
9 element becomes a mystery. Because, as I've argued  
10 previously, if you're looking at that element and you  
11 take it on its face -- and when we step back and we look  
12 at the canons of construction -- when you have a term  
13 like that, appeals to the prurient interest in sex, that  
14 for 50 years has meant one thing and only one thing when  
15 applied to visual materials, that's presumptively the  
16 definition that the Texas legislature intended to apply.  
17 But there -- there's no application of a lewd exhibition  
18 of clothed children that could ever appeal to the  
19 prurient interest in sex given the, again,  
20 well-established gloss about what that phrase means.

21           So a member of the public reading the statute  
22 about what appeals to the prurient interest in sex would  
23 have no clue about what to do to avoid prosecution.  
24 Because under any reasonable construction that the  
25 standard -- the technical standard construction of that

1 term, you cannot as a matter of law appeal to the  
2 prurient interest in sex in clothing lewdly exhibiting  
3 your pubic area. And we've cited cases in a footnote  
4 about what it takes to show that element of appeals to  
5 the prurient interest in sex. And no one could think --

6 THE COURT: Let me ask you a question.

7 MR. BENNETT: Yeah.

8 THE COURT: I understand that the producer of  
9 this movie had a view that this -- this film addresses  
10 some issues that she felt needed to be addressed in  
11 society and basically kind of suggesting that there's  
12 been a decline in moral values. Children being  
13 neglected. They feel -- Amy, I think, is the name of  
14 the character. She's 11, and she's feeling vulnerable.  
15 And she needs the support, and she needs -- and so she,  
16 you know, seeks this -- to be part of the crowd, joins  
17 up with a dance troop, and it kind of goes on from  
18 there. And from that, I think maybe the producer is  
19 trying to say, look, world, this is how far we've come,  
20 and it has some consequences.

21 Now, is that -- the question is: Does  
22 that -- does that then, in your mind, qualify at least  
23 as, perhaps, either literary or artistic or political  
24 value? And as a subset, let me even say -- I mean, if  
25 you want to see nudity, you can go to virtually any



1 major art museum in the world, but it has artistic --  
2 it's in an art museum, for crying out loud. Now,  
3 whether or not someone -- you say, well, that exhibits  
4 the public area of someone. That's number one, yes.  
5 Does it appeal to the prurient interest in sex? Well,  
6 I'll spot you that one maybe. I mean, I'll just give  
7 you that one. But even if you had one and two, and  
8 since the statute uses the word "and," you have to have  
9 all three in order for it to be a violation. I'm kind  
10 of surprised you haven't talked more about that and what  
11 is the social value -- the literary, artistic, or  
12 political value of -- in other words, you might have one  
13 and two, but when we get to number three, it may be -- I  
14 don't know. It may have tremendous literary, artistic,  
15 or political value as distasteful as it may be.

16 MR. BENNETT: So three responses. And I  
17 think this gets to where we're trying to walk this  
18 tight -- this kind of tightrope between these two worlds  
19 of the merits in this case and the reason the merits are  
20 implicated in the state court case especially as to that  
21 element.

22 So no serious artistic, literary, or --

23 THE COURT: Political --

24 MR. BENNETT: -- public value. Our film  
25 certainly -- it -- no one -- no reasonable prosecutor

1 could accuse it of having no such value. That goes to  
2 bad faith and why Younger's inappropriate because a  
3 prosecutor who watched *Cuties* could never think to get a  
4 conviction under that because it's profoundly  
5 important -- it has profound value, and it's not for  
6 everybody. We understand. Netflix knows that. Not  
7 everyone's going to like the film. But the message that  
8 is portrayed in that film are -- is -- we spend the  
9 entire first six pages of our fact section in our TR0  
10 explaining how profoundly important the film's message  
11 is.

12           So the -- for purposes of the merits of the  
13 underlying -- and, again, that's not implicated in the  
14 pending charges. That was only for purposes of 262.  
15 Because under *Ferber* and consistent with the  
16 constitution, if it's really child pornography, you  
17 don't have to show it lacks any serious artistic value.  
18 That's out. That's a *Miller* element that does not apply  
19 to pornography. It matters for purposes of 262 because  
20 the legislature sort of -- in trying to create and  
21 criminalize this new category of banded speech, it's  
22 straddled two horses. Part A or (b)(1) is sort of the  
23 *Ferber* horse, and then the other two elements, (b)(2)  
24 and (b)(3,) are the *Miller* horse.

25           And you can't straddle both because it just

1 makes everything confused and indecipherable. So that's  
2 where it matters for purposes of the vagueness argument.  
3 But for purposes of our facial constitutional challenge,  
4 the *Lowry* court already made this point for us. In  
5 trying to prosecute Mr. Lowry, the judge -- and it came  
6 up again during oral argument in *Lowry*. I watched it.  
7 The judge asked about the *Netflix* case, Mr. Babin's  
8 case.

9 THE COURT: Yes.

10 MR. BENNETT: And specifically about no  
11 serious literary, et cetera, value. At that point, the  
12 Harris County prosecutor pulled up -- and they did it  
13 again in oral argument -- and said, "I can't speak for  
14 another district attorney's indictment. We think it  
15 does have artistic, literary, et cetera, value." In  
16 other words, they don't agree with Mr. Babin. And that  
17 gets back to the vagueness problem, which is when a  
18 prosecutor without proper guidance from the legislature  
19 indicts in -- and pursues felony charges against  
20 anyone -- any individual, any corporation -- it confuses  
21 what the statute means. And we're all left to guess,  
22 well, geez, if *Cuties* doesn't meet that element, what  
23 does?

24 Again, not that the message -- the film's for  
25 everyone. You may really dislike it. We've cited

1 articles in both our motion here and the habeas petition  
2 in the state court where lots of people don't. And we  
3 don't have a problem with that. People are welcome to  
4 their opinions and to discuss them because we hope it  
5 will mean that they discussed the profound messages of  
6 the film. But in any event, with the film having such  
7 merit and such importance, we find ourselves in -- we  
8 found ourselves indicted except -- until it was on the  
9 eve of the hearing where that was going to be  
10 adjudicated. And now we're under something else where  
11 we can't argue any of that, right? We can't argue that  
12 because under 43.25 in *Ferber*, we don't get to point  
13 those facts out anymore.

14           So I think that -- again, that's not a merits  
15 issue. That goes to why this -- why Younger abstention  
16 shouldn't apply. So when we get to irreparable harm, we  
17 have that. It's presumed as a matter of law. I will  
18 also say under the Fifth Circuit's authorities -- we've  
19 cited *Thompson* and some others. If you have bad faith  
20 to justify not abstaining under Younger, irreparable  
21 harm is presumed again. So we have presumptive  
22 irreparable harm twice over.

23           Balancing the public interest. And, again,  
24 we recognize the extraordinary nature of what we're  
25 asking here. We did not do this lightly. But it's the

1 extraordinary nature of what we face having five  
2 indictments that are violative of the constitution. And  
3 that's -- when we weigh the public interest -- it is in  
4 the public's interest to ensure that officials are held  
5 to the constitution, which they took an oath to support.  
6 It's in the public's interest to make sure that persons,  
7 citizens, companies vindicate their company -- their  
8 First Amendment and other rights -- due process  
9 rights -- that's the vagueness issue -- even if there  
10 are criminal -- pending criminal charges when they --  
11 violations are as serious as the ones that their records  
12 shows are present and that the law says entitled Netflix  
13 to a federal forum and to federal relief.

14           So it is in the public's interest to proceed  
15 with a TRO to enjoin at least for the period that  
16 Rule 65 of the federal rules allow, and then we'll come  
17 back at an injunction hearing. But it is always in the  
18 public's interest to ensure that state officials,  
19 especially those that wielded the awesome power of the  
20 criminal law and the criminal process, are held at bay  
21 and held consistent with what the law requires them to  
22 abide by.

23           The last element is bond. I mean, I'm not  
24 going to spend too much time talking about that. We  
25 don't think a bond's necessary here. The Fifth Circuit

1 said you don't have to impose a bond. I don't know  
2 what -- bonds are intended to show if you enjoined  
3 something what --

4 THE COURT: Hurting somebody's financial  
5 interest or something --

6 MR. BENNETT: Right. And I don't know  
7 what -- I can't conceivably think of what that would be  
8 here.

9 THE COURT: Some nominal bond, I suppose.

10 MR. BENNETT: Yeah. And we're okay with  
11 that. We've suggested 1,500, which we can do.

12 But what I want to circle back to just to --  
13 kind of in closing is some of the other --

14 THE COURT: That would take that off -- that  
15 would take that off the map, and we wouldn't have to  
16 worry about that.

17 MR. BENNETT: Right. Some of the other  
18 arguments that the state raised this morning in its  
19 brief -- aside from Younger abstention, it asserted Heck  
20 and some others. Those just don't apply, and it doesn't  
21 apply on the face of the state's own brief. Heck is an  
22 abstention doctrine, an exhaustion doctrine that applies  
23 only when a conviction's been held. There's no  
24 conviction here. It also only applies when damages are  
25 at issue, and the very title of our complaint is a

1 complaint for injunctive relief. Netflix isn't  
2 seeking damages. It only wants an injunction to  
3 enjoin unlawful prosecution that's inconsistent with the  
4 First Amendment.

5           So 1983 affords injunctive relief.  
6 Prosecutorial immunity is not in the least invoked when  
7 only injunctive relief is sought. So they've raised  
8 that argument, and it's wrong on the law. And then,  
9 again, in terms of Heck exhaustion, it doesn't even  
10 apply where there's no conviction. And, again, no -- no  
11 request for money damages, which we haven't asserted.

12           So they have no defense. Younger abstention,  
13 we've already acknowledged and shown that it doesn't  
14 apply for all the reasons in cases evident in the fact  
15 and the law. So really it's just a question of  
16 likelihood of success, which we've shown, and they've  
17 not rebutted. They have not -- they have not taken any  
18 time in the response -- for purposes of the TR0 today to  
19 show why we wouldn't be entitled to that relief.

20           So we ask for the TR0, that Mr. Babin be  
21 enjoined, and all of the people under Rule 65(d) that  
22 that would mean, right? That doesn't mean just  
23 Mr. Babin. His agents, his attorneys, and all those  
24 in -- that act in concert with him be prohibited from  
25 pursuing any charges under 43.262, re-indictment,

1 convening a grand jury for that purpose, whatever it is,  
2 or pursuing in the state court the four new indictments  
3 under 43.25 because they're profoundly unconstitutional  
4 as applied to the film *Cuties* --

5 THE COURT: Well, let's -- let's talk about  
6 that.

7 MR. BENNETT: Yes.

8 THE COURT: The indictments exist. A TRO  
9 would be good for 14 days. I mean, given the history  
10 of, should we say, the lack of prosecution for some  
11 400 days, abstaining from further criminal action for  
12 14 days doesn't seem to be really much of an issue.  
13 It's unlikely that you'd be forced to defend a criminal  
14 case sometime in the next 14 days, fair?

15 MR. BENNETT: Certainly not to defend, but  
16 there are pre -- so, for example, arraignment  
17 typically --

18 THE COURT: To take -- in other words --  
19 because what if at the end of 14 days and we're here  
20 again -- and I'm going to ask you what you envision down  
21 the road at a hearing on a preliminary injunction, which  
22 is sometimes essentially the same facts as a permanent  
23 injunction, which sometimes there's not even a need for  
24 that subsequent proceeding. But during these -- if you  
25 were unsuccessful at the -- if you were successful with



1 the TRO, but, you know, after more of a production -- I  
2 mean, usually for these TROs, the defendant's not even  
3 here. And -- but give them an opportunity for a fuller  
4 presentation of the case and, perhaps, give you an  
5 opportunity of a fuller presentation of your case. But  
6 if you were unsuccessful at that point, then you  
7 wouldn't expect them to have to go back to -- if they  
8 were so inclined to re-indict you, correct? In other  
9 words, we'd just hold the current indictments in  
10 abeyance. Now, obviously, if you're successful  
11 ultimately, then that's -- that's a different story, but  
12 I'm looking at the other end. At the end of 14 days,  
13 where are we? Are we just basically saying --  
14 essentially staying all -- the indictments are still  
15 there, but they're not necessarily destroyed. They're  
16 just not being acted upon. Is that what you're asking  
17 for?

18 MR. BENNETT: So, ultimately, what we're  
19 asking for is --

20 THE COURT: Ultimately. But I'm talking  
21 about over the next 14 days. I mean, what if you were  
22 ultimately -- ultimately unsuccessful? Would you -- or  
23 would you be saying those indictments would no longer  
24 have any -- then if he so choose, he'd have to go back  
25 and get a new indictment?

1 MR. BENNETT: No. So the way that the case  
2 law comes down on these issues when you're dealing with  
3 a 1983 action against --

4 THE COURT: Right.

5 MR. BENNETT: -- an individual state  
6 official -- we're not enjoining state courts. Not  
7 asking for that. What we're asking for is an injunction  
8 against the official from pursuing -- right --  
9 prosecuting -- anyone who acts in concert with him --  
10 prosecuting Netflix while the merits of Netflix's  
11 constitutional challenges are adjudicated in federal  
12 court.

13 THE COURT: Okay. And initially that would  
14 be for 14 days then, and we come back and do -- now,  
15 what do you envision -- and I'm not asking for trial  
16 strategy or anything, but -- and I'm -- do you have --  
17 do you have more that you want to present today?

18 MR. BENNETT: No, your Honor. I think our  
19 presentation in terms of showing ourselves likely to  
20 succeed and that we're entitled to an injunction --  
21 we've made our case, pending whatever they have to say.

22 THE COURT: All right. And at some point,  
23 we'll need to watch the video, but I suppose -- do we do  
24 that here? Do we do that in chambers privately or  
25 however we want to do it? What do you envision?

1 MR. BENNETT: Certainly, if your Honor wants  
2 to watch the video with us present in court, we have  
3 discs, and we can make that happen. I -- I would be  
4 fine if your Honor just watched it in chambers. I don't  
5 think, you know, we need to have a -- we're not afraid  
6 to or we're fine to.

7 THE COURT: No. I understand.

8 MR. BENNETT: But we -- but it's certainly up  
9 to your Honor's discretion in terms of that.

10 THE COURT: Okay. Okay. All right. Well,  
11 that's fine.

12 Back to my original question. What do you  
13 anticipate in 14 days assuming a TR0 is granted? What  
14 do you anticipate the nature of that hearing to be?

15 MR. BENNETT: And so we think largely  
16 98 percent of this case is just a legal issue. The  
17 facts are undisputed, and the facts are the film. It  
18 can't be changed. The film is the film. Nothing is  
19 going to change about that film. It is what it is. The  
20 question is: How does the law apply under the First  
21 Amendment or the Fifth Amendment to that film and how do  
22 those come out?

23 So it's something of a mixed question in the  
24 sense that there are some facts involved, but those  
25 facts are not and cannot be disputed in terms of what we

1 have to prove.

2 THE COURT: Uh-huh.

3 MR. BENNETT: Now --

4 THE COURT: Well, would you -- would you put  
5 on some evidence of, for example, the literary,  
6 artistic, political value of the case?

7 MR. BENNETT: No. We don't have to. That's  
8 more to the merits. So if we were proceeding in state  
9 court, certainly we would in that context. But that --  
10 those facts -- although we'd be happy to continue  
11 developing that certainly in court, it's not relevant to  
12 the First Amendment challenged. That's a baseline,  
13 bottom line constitutional principle.

14 THE COURT: Okay.

15 MR. BENNETT: And so your Honor can watch  
16 the film and make that determination as a -- as a  
17 matter of law. The reason I held out the 2 percent is  
18 because of the state's assertion of Younger abstention.  
19 That's -- the burdens under a preliminary or even a  
20 permanent injunction under the Supreme Court's  
21 decision in -- it's a very long name -- it's a  
22 Brazilian/Portuguese name. The burdens of injunctive  
23 relief track the burdens of trial. So for purposes of  
24 preliminary injunctive relief, we just have to make our  
25 burden and show that our affirmative claims are met. If

1 they have defenses like Younger abstention, it's their  
2 obligation to meet their burden. But if -- the burden  
3 then shifts back to us, we might have to develop some  
4 facts to refute some of that.

5 I don't anticipate that's going to be the  
6 case. It could be the case.

7 THE COURT: Okay.

8 MR. BENNETT: So that's the only reason why I  
9 hung out the 2 percent caveat, but we think largely this  
10 is a pure issue of law for the Court to decide because  
11 the facts are not and cannot be disputed.

12 THE COURT: Okay. All right. Thank you very  
13 much.

14 Let me just -- before I -- well, let me ask  
15 the other side: Do you have a presentation you would  
16 like to make today?

17 MR. LINDSEY: I do, your Honor.

18 THE COURT: All right. I've given the  
19 plaintiff in this case -- we did start a little bit  
20 late -- but at least an hour and a half or more.

21 About how much time do you feel that you  
22 need?

23 MR. LINDSEY: Depending on the questions that  
24 are asked --

25 THE COURT: I understand.

1 MR. LINDSEY: -- not nearly that much. I  
2 think I can probably address everything that has been  
3 raised in a half hour or less.

4 THE COURT: Okay. I'm sure that -- I mean,  
5 the question is -- and maybe it's wise that we do it --  
6 take a lunch break and come back and allow you to --  
7 we're definitely going to take some sort of a recess  
8 because we've had everybody in place for almost two  
9 hours. And I think that's -- we just need to have a  
10 comfort break at the very minimum, but -- maybe it might  
11 be wise that we go ahead and break.

12 Do you all have a -- break for lunch and come  
13 back, say, at 1:00 o'clock. Let you continue and then,  
14 I assume, you would probably have some sort of rebuttal  
15 to that. So we could be here -- if we came back at  
16 1:00, we could be here maybe another hour. I'm not  
17 trying to put limits on anybody. I'm not suggesting  
18 that. We -- the Court has other matters to tend to,  
19 including a trial starting -- a six-day trial starting  
20 next week, but -- we've already had the pretrial hearing  
21 on yesterday, but we'll -- we have a lot to absorb,  
22 but -- I don't know. What do you all want to do? I can  
23 give you a break -- lunch break and then come back and  
24 finish.

25 MR. LINDSEY: I think my vote would be to

1 just take a comfort break and -- like maybe 10,  
2 15 minutes and then proceed.

3 THE COURT: What do you want to do?

4 MR. BENNETT: Yeah. If that works for your  
5 Honor and the staff -- I talk kind of fast, so I might  
6 have been overworking some folks.

7 THE COURT: I understand. Let me talk to my  
8 staff.

9 Let's take about a -- let's go ahead and take  
10 a 20-minute break and report back here at about 12:15,  
11 okay?

12 (A recess was taken at this time.)

13 THE COURT: Thank you. And please be seated.

14 All right. Mr. Lindsey, are you going to go  
15 forth now?

16 MR. LINDSEY: I am, your Honor, with your  
17 indulgence.

18 THE COURT: Yes, please.

19 MR. LINDSEY: Would your Honor mind if I  
20 stayed right here instead of decamping --

21 THE COURT: Are you needing to use your  
22 computer or --

23 MR. LINDSEY: I believe I will. I can move.

24 THE COURT: And there's -- yeah. It might be  
25 a little better if you can put your computer there.

1           MR. LINDSEY: Yes, sir. Your Honor, I will  
2 make every effort to be as surgical as possible under  
3 the circumstances.

4           THE COURT: Well, I want you to take as much  
5 time as you need in order to articulate your defense in  
6 this case.

7           MR. LINDSEY: Yes, sir.

8           First, I wanted to clear something up that  
9 opposing counsel said about our response. There is no  
10 suggestion that the Younger doctrine would apply to the  
11 charge under -- would apply to the charge under 43.262.  
12 I believe I made that clear in the argument. I titled  
13 it as only applying to 43.25. And also in the  
14 conclusion of that section --

15           THE COURT: So you have no objection to the  
16 Court abstaining for any 265 evaluations? Is that what  
17 you're saying?

18           MR. LINDSEY: Well, what I'm saying is, your  
19 Honor, the Younger abstention doctrine does apply to  
20 43.25.

21           THE COURT: Right.

22           MR. LINDSEY: Because there's an ongoing  
23 criminal prosecution.

24           THE COURT: Okay.

25           MR. LINDSEY: I believe the state -- the case



1 law is clear that it would not apply currently to 43.262  
2 because there is not an ongoing matter.

3 THE COURT: All right. So we've got that off  
4 the table. That's good.

5 MR. LINDSEY: Yes, sir.

6 So tackling 43.25 first, as opposing counsel  
7 says, this is a very high burden, and the three elements  
8 that you have to meet for Younger are very clearly met  
9 here. We have an ongoing prosecution -- an ongoing  
10 state judicial proceeding. That's admitted. Important  
11 interest subject matter proceeding is implicated. I  
12 don't believe that's at issue. And the state  
13 proceedings must afford an adequate opportunity to raise  
14 constitutional challenges. I don't think that's at  
15 issue. Constitutional challenges can be raised in  
16 pretrial motions. They can be raised in front of the  
17 jury. They can be raised in front of the appellate  
18 court. There are avenues here.

19 So what we have from opposing counsel is a  
20 reliance on bad faith tactics. No hope of conviction.  
21 But what we don't have is any actual demonstration of  
22 that. What we are relying on here is speculating  
23 Mr. Babin's motives. It sounded to me that the mere act  
24 of withdrawing a charge and filing a different charge in  
25 the face of a writ must be retaliation per se. There is

1 no evidence of causation here. There is no evidence of  
2 what was going on in Mr. Babin's mind. There's simply a  
3 substitution of charges. There's nothing indicating  
4 actual retaliation. So that doesn't overcome Younger.

5 And then we raised several questions  
6 indicating that the Court should find that the statute  
7 is unconstitutional on its face. And so the Court must  
8 step in and stop this before it gets started. The  
9 problem is every single aspect of this are jury  
10 questions. Does the conduct fit the statute? That's a  
11 jury question. And once the jury resolves it, it's a  
12 question for the appellate court. Is this a matter of  
13 artistic value? First of all, it doesn't apply to  
14 43.25, but even if it did, this is a matter decided by  
15 community standards. And a jury decides that, and an  
16 appellate court decides that. There's simply nothing  
17 that has been raised here that the Court needs -- this  
18 Court needs to step in that should not be resolved in a  
19 state court.

20 THE COURT: I want to ask you with regard  
21 to -- to the fact that there is still this pending  
22 evaluation of 43.262 --

23 MR. LINDSEY: Yes, sir.

24 THE COURT: -- for which you've said the  
25 Younger abstention doctrine does not apply to prohibit

1 me from evaluating that aspect of their complaint,  
2 correct?

3 MR. LINDSEY: Yes.

4 THE COURT: All right. Does the state feel  
5 that there is any artistic, literary, or political value  
6 at all in the movie when taken in its totality?

7 MR. LINDSEY: I don't believe the state has  
8 taken a position on that, and I don't believe it would  
9 be appropriate to take a position on that. It's an  
10 undecided issue. And it's an issue that's fatal to this  
11 proceeding because that is something that needs to be  
12 decided by a jury.

13 THE COURT: Okay.

14 MR. LINDSEY: And, particularly, a jury in  
15 Tyler County applying their community standards.

16 THE COURT: Okay.

17 MR. LINDSEY: But -- since we're talking  
18 about 43.262, going to the elements of what it takes to  
19 get relief -- injunctive relief in this court, I'll skip  
20 to Section 2 here, the substantial -- I'm sorry -- no.  
21 I'll just start from the top. Substantial likelihood of  
22 success on the merits.

23 THE COURT: Right.

24 MR. LINDSEY: So as -- as we have discussed,  
25 this case -- the *Lowry* case is not concluded. And so

1 there's no way that this Court can say that Netflix will  
2 succeed on the merits when we don't even know what the  
3 merits are yet. It's still in review.

4 THE COURT: Well --

5 MR. LINDSEY: Secondly --

6 THE COURT: Well, the writ has been granted  
7 in that case, as I understand it. It was granted on  
8 March 2nd of this year, but -- and we don't know what  
9 the higher court will do with it yet. I suppose at  
10 least -- somebody at least wants to re-examine some or  
11 all of that opinion, and that's why writ was granted.  
12 That doesn't necessarily mean, though, that it's not --  
13 that it is going to be overruled or overruled in part.

14 As it stands right now, is that decision, the  
15 *Lowry* decision, the case law that would -- that applies  
16 to that issue? To the issues laid out there? Is there  
17 something else I would adopt and apply?

18 MR. LINDSEY: Negative, your Honor. The  
19 *Lowry* decision does not apply here.

20 THE COURT: It does not apply?

21 MR. LINDSEY: No. The *Lowry* court  
22 specifically, and I quote, confined our analysis to the  
23 portion of Section 43.262 that prohibits a person from  
24 knowingly possessing visual material. This is not a  
25 possession case. This is a lewd exhibition case.

1 THE COURT: In terms, though, of that court's  
2 discussion of your client's case, though, or should --  
3 or, perhaps, you might argue that's dicta. I'm not  
4 sure.

5 MR. LINDSEY: Correct.

6 THE COURT: But whether it was -- it violated  
7 the statute or not, I think there's -- there is a --  
8 some indication of the Court's opinion about that.  
9 Would you agree?

10 MR. LINDSEY: I don't know if I could  
11 necessarily agree. There is certainly solid indication  
12 on what the Harris County district attorney thinks about  
13 it, but the point of the matter is the law is not  
14 settled on this. And so in order for Netflix to proceed  
15 here, this Court needs to find that the law is settled,  
16 that this is a baseless prosecution, that this is an  
17 unconstitutional statute, it could never be brought  
18 against them, and therefore they need to be -- Mr. Babin  
19 needs to be enjoined. And that's just not the case.

20 THE COURT: Well, now for -- now, maybe at  
21 the injunctive level, but this is just for temporary  
22 restraining order.

23 MR. LINDSEY: Yes, your Honor.

24 THE COURT: And so the final -- I'm not here  
25 to make a final decision on any of that. It's just

1 whether or not they have -- they've met their threshold  
2 of having a probable right of recovery. Have they  
3 articulated that or not?

4 MR. LINDSEY: No, your Honor. And, again,  
5 this first element, substantial likelihood of success on  
6 the merits, we don't know what success on the merits  
7 would look like right now. The law is unsettled. It  
8 could very well be that this statute is upheld and is  
9 perfectly constitutional. It could very well be that it  
10 becomes wholly unconstitutional in the future. The fact  
11 of the matter is this has not been given an opportunity  
12 to play out in the state court --

13 THE COURT: Okay.

14 MR. LINDSEY: -- at the trial level or  
15 appellate level.

16 THE COURT: Okay.

17 MR. LINDSEY: The second element, substantial  
18 threat of irreparable harm. I know Mr. Bennett touched  
19 on this, but I think he mischaracterized a few things.  
20 Yes. There is a substantial threat of irreparable harm  
21 to Netflix if they lose this case, if they are  
22 convicted. However, the standard is substantial threat  
23 of irreparable harm if the injunction is not granted.

24 THE COURT: Let me ask you something, and I  
25 asked your opposing counsel this -- about, you know,

1 what happens to a corporation that's indicted? How does  
2 it harm them? I mean, I was told there could be some  
3 fines; is that true?

4 MR. LINDSEY: That is my understanding, yes,  
5 your Honor.

6 THE COURT: Okay. Which is some harm. But  
7 in a broader sense, I think -- I'm assuming for purposes  
8 of this comment or this question -- that corporations do  
9 not like to be indicted. It doesn't do a lot for their  
10 corporate image. They're an indicted corporation. It  
11 sounds -- even though we all recognize the presumption  
12 of innocence, it's still they're an indicted  
13 corporation.

14 And could it -- and this is the question: If  
15 there is a threat of indictments for one case or  
16 another, could that be -- could that then be a chilling  
17 effect on what movies, in this case Netflix, chooses to  
18 put on their system? In other words, well, we better  
19 not put that on there, somebody -- we might get  
20 indicted, you know. And so they then shy away from --  
21 just for fear of being indicted, movies that might --  
22 might be less offensive than this particular movie  
23 *Cuties*.

24 MR. LINDSEY: I -- certainly that could be  
25 the result of something like this. However, our

1 argument would be there is no threat of prosecution  
2 right now. The one thing that's happened --

3 THE COURT: Well, wait a minute. They're  
4 indicted, are they not?

5 MR. LINDSEY: They're indicted under 43.25.

6 THE COURT: I got that. And the other was  
7 without prejudice.

8 MR. LINDSEY: That's correct. And that's the  
9 only indication that, perhaps, another charge like that  
10 could be brought, but there is no actual threat that  
11 such a charge will be brought. The two charges were  
12 simply swapped, and it's my understanding that it's  
13 pretty standard practice to dismiss an indictment  
14 without prejudice. There's no implicit threat there  
15 that the same charge is going to be brought up again, if  
16 that answers your question, your Honor.

17 THE COURT: Well -- okay. I accept what you  
18 said.

19 MR. LINDSEY: And, your Honor, I would also  
20 point you to precedent where federal courts have stepped  
21 in where *Younger* does not apply.

22 THE COURT: Right.

23 MR. LINDSEY: And these are situations --  
24 I'll specifically point the Court to *Google v. Hood*,  
25 822 F.3d 212, Fifth Circuit 2016. This case cites many



1 other similar cases. These are all circumstances where  
2 the state was issuing repeated subpoenas and pretrial  
3 investigations and overtly threatening a prosecution  
4 that had not happened yet. And so the federal court  
5 jurisdiction was invoked in order to deal with that  
6 situation. This is not the same situation. This is a  
7 one charge that has been dismissed as a matter of  
8 course.

9 THE COURT: Right.

10 MR. LINDSEY: It is simply up to the  
11 prosecutor to bring that charge again if more evidence  
12 develops, but there's no actual threat that that's going  
13 to happen. There's no request for discovery. There's  
14 no subpoenas. Nothing like that to Netflix concerning  
15 that particular charge.

16 THE COURT: Okay. Would the statute of  
17 limitations on that just go from the date of the last  
18 day of streaming?

19 MR. LINDSEY: I honestly don't know, your  
20 Honor.

21 THE COURT: Okay.

22 MR. LINDSEY: I will not insult you by  
23 guessing.

24 If I could return to number two, substantial  
25 threat of irreparable harm if the injunction is not

1 granted. As the Court pointed, this injunction would by  
2 necessity be temporary. There is nothing articulated  
3 here where some harm would result because this  
4 particular injunction is not granted. Fourteen days are  
5 going to lapse, and the indictments are still going to  
6 exist. It's a moot point.

7           There's also, on a broader scale, no  
8 assertion of irreparable harm that would not be visited  
9 on Netflix by a jury. There's nothing suggested here  
10 that Mr. Babin needs to do that cannot be remedied  
11 through the proper court procedures. And so this  
12 injunction is necessary. Jurisdiction for this Court is  
13 necessary.

14           And then I'll address the third and fourth  
15 element at the same time. What we have here is a real  
16 public policy issue. The message this sends to  
17 Mr. Babin and every other prosecutor is they cannot find  
18 a better charge and substitute it without being dragged  
19 into federal court. There is no evidence that he did  
20 not do exactly that for just the reasons of getting a  
21 more appropriate charge and judicial efficiency. And  
22 so --

23           THE COURT: I think he stated that in his --  
24 in his withdraw. That there were -- the facts were more  
25 suited -- I don't remember. I'm paraphrasing it. A

1 different statute or some words to that effect.

2 MR. LINDSEY: Yes, your Honor.

3 And so this -- this does -- it causes harm to  
4 the defendant, and it does disserve the public interest  
5 because now prosecutors have to worry every time that  
6 they're faced with potentially being able to cure a  
7 charge that isn't the best, but if I do that, well, then  
8 I'm going to get dragged into federal court. So now  
9 there's an incentive, if precedent is set in this  
10 matter, to keep a bad charge and pursue that. That  
11 certainly disservices the public interest. I also  
12 wanted to --

13 THE COURT: Yeah. I think it said the facts  
14 of this case are better suited for other statutes.

15 MR. LINDSEY: Correct.

16 THE COURT: That's when the state was  
17 dropping 43.262.

18 Okay. Go ahead.

19 MR. LINDSEY: That would be Mr. Babin's  
20 motivation.

21 THE COURT: Right.

22 MR. LINDSEY: There's no evidence of any  
23 other motivation.

24 THE COURT: Uh-huh.

25 MR. LINDSEY: I just wanted to note to clear

1 up a couple other things specifically about the Dost  
2 factors. I don't know anything about the legislature  
3 jettisoning Dost factors. But whatever they did, the  
4 message did not get to the Court of Criminal Appeals.  
5 Because as of 2017, *State v. Bolles*, 541 S.W.3d 128, the  
6 Court of Criminal Appeals were applying the Dost factors  
7 to the definition of lewd under 43.25 as recently as  
8 last year in *Romo v. State*, 629 S.W.3d. 679. This is  
9 the Fourth Court of Appeals out of San Antonio relying  
10 on *Bolles* applying the Dost factors.

11           It's also important to note the Dost factors  
12 are not dispositive. And so I'm not sure if Mr. Bennett  
13 specifically made this argument, but it was brought up  
14 that one of the Dost factors includes clothing --  
15 whether they were clothed or not. That issue is not  
16 dispositive. These are advisory. These guide the Court  
17 on what "lewd" means. So what we do have is the focal  
18 point of visual depiction being on the child's genitalia  
19 or pubic area. Whether the setting of visual depiction  
20 is sexually suggestion. Whether the child is depicted  
21 in an unnatural pose. Then whether the child is fully  
22 or partially clothed or nude. Whether the visual  
23 depiction suggests sexual coyness or willingness to  
24 engage in sexual activity. And, finally, whether the  
25 visual depiction is intended or designed to elicit a

1 sexual response from the viewer.

2           If you read the Court of Criminal Appeals  
3 opinion, not qualifying for one of these advisory  
4 factors is not dispositive of the whole thing. This  
5 just guides the Court on finding what is lewd and what  
6 is not under a particular set of circumstances, which,  
7 again, is not in the purview of this Court right now.  
8 It's under the purview of, first, a jury and then an  
9 appellate court in the Texas state system.

10           I believe I've covered everything that came  
11 up, your Honor.

12           THE COURT: Okay. Well, I appreciate it.

13           MR. LINDSEY: Thank you.

14           THE COURT: Mr. Babin, do you care to address  
15 the Court?

16           MR. BABIN: Well, your Honor, I would just  
17 say that -- thank you for your time today. And the only  
18 thing I would add to that, your Honor, is that I believe  
19 many, if not most, of the issues that Mr. Bennett raised  
20 can be addressed by a jury in the State of Texas. And I  
21 would also just add to that that his representation to  
22 this Court about the ruling in the *Lowry* case was not  
23 accurate. The *Lowry* decision did not find that entire  
24 statute facially unconstitutional. As Mr. Lindsey just  
25 stated, the *Lowry* court found only the portion of it

1 that was charged in the Harris County case  
2 unconstitutional. So that was not accurate.

3 And other than that, Judge, I would just  
4 remind the Court that we have only had but a few hours  
5 to prepare anything for this morning. So beyond that --

6 THE COURT: Same for the Court.

7 MR. BABIN: Yes, sir. I understand. But  
8 that's all I have at this time.

9 THE COURT: All right. Thank you very much.  
10 I appreciate that, Mr. Babin.

11 All right. Mr. Bennett, do you care to have  
12 some more words for us?

13 MR. BENNETT: Yes, if I may, your Honor.  
14 Points in rebuttal. And I'll make it as quick and talk  
15 as slow as I'm capable of.

16 There's ample evidence just -- we're focusing  
17 on Younger. Let's stay with Younger because we like  
18 Younger, right? It showcases the facts about why  
19 federal relief is so necessary in this case. So when it  
20 comes -- so I'm glad we agree that the Court can  
21 maintain jurisdiction over this case and ought to  
22 adjudicate the underlying claim for lack of mootness --  
23 that Younger doesn't apply, and there's no mootness here  
24 because, A, the state maintains the statute's  
25 constitutional. B, there's been no adjudication that

1 we've asked for, and we can obtain a federal forum for  
2 it without worrying about Younger. And, C, despite what  
3 my friend on the other side argued just a moment ago,  
4 there's a world of difference -- and the cases that he's  
5 alluding to are easily distinguishable.

6           And there's plenty of cases that -- that  
7 distinguish them and come out our way. And that's -- it  
8 would be one thing if before the indictment Netflix had  
9 run to federal court with no prosecutors having indicted  
10 them of a second degree felony under state law for  
11 promoting *Cuties*. But it just ran to federal court and  
12 said, well, we don't know of anything, but we just don't  
13 like this statute. So we want a pre-enforcement  
14 challenge.

15           It gets a little narrower at that point, but  
16 we're 500-plus days beyond a pre-enforcement challenge.  
17 We are 500 days post-enforcement. And under binding  
18 Fifth Circuit and Supreme Court law, when you've been  
19 indicted and a voluntary dismissal is made and it's not  
20 with prejudice and the state stands behind its conduct  
21 and the statute at issue, the best predictor of what  
22 has -- what will happen in the future is what has  
23 happened in the past. And Court 's hold under all of  
24 those circumstances it's a live controversy. So the  
25 Court has mandatory jurisdiction, federal question

1 jurisdiction, to adjudicate Netflix's First Amendment  
2 challenge 262.

3           And I want to correct what's being said --  
4 I've been accused of mischaracterizing some law on  
5 *Lowry*. Let's be very clear about what *Lowry* said and  
6 didn't say. *Lowry* did not limit itself and can't be  
7 credibly read to limit itself to a possession charge.  
8 Possession was the charge, that's true. What the Court  
9 said is we're limiting our opinion in Footnote, I  
10 believe, 8 -- we're limiting our opinion to clothed and  
11 partially clothed. We're not reaching the issue of  
12 unclothed because that's not at issue in the materials  
13 at issue in *Lowry*. That's the carveout. That's *Cuties*.

14           So I have accurately represented *Lowry*. I  
15 have accurately represented the Court's holding in  
16 *Lowry*, and that is that under those two pieces of 262,  
17 it's substantially unconstitutional on all of its  
18 applications. And it isn't invalid only as applied to  
19 Mr. Lowry but as to everyone. So it's a facial  
20 challenge. That's why it's *ex parte*. It is a pretrial  
21 habeas petition. So we have been very correct and clear  
22 about what *Lowry* said.

23           But the other problem with what my friend on  
24 the other side said about *Lowry* is -- he seems to imply  
25 that a state court decision somehow precludes a federal



1 court from adjudicating a federal constitutional issue.  
2 That somehow this Court has to defer to a state court of  
3 appeals or even the Texas Court of Criminal Appeals  
4 before it can adjudicate a claim before it and over  
5 which it has undisputed federal question jurisdiction.  
6 That's not the law anywhere. It's never been the law.  
7 It won't be the law. It's in the constitution that  
8 federal courts adjudicate federal issues. So there's no  
9 deference owed to *Lowry* or the Court of Criminal  
10 Appeals. They can reach whatever conclusion they  
11 want --

12 THE COURT: Although to the extent it helps  
13 you, you don't mind my reading *Lowry*.

14 MR. BENNETT: It's definitely persuasive and  
15 certainly will do it, but our main reason in citing  
16 *Lowry* isn't necessarily even the conclusion it reaches  
17 because we just think the conclusion *Lowry* reaches is --  
18 to 43.262 is just really obvious under existing law.  
19 The reason *Lowry* is so useful to us is what you  
20 discussed with -- with my friend on the other side about  
21 what's going on with -- what the state is doing here.  
22 You asked the state to take a position today on whether  
23 the film has artistic merit, and it refused to do it.  
24 Meanwhile, it's taking conflicting positions on that  
25 very issue in the public sphere. It says it is and it

1 is not. We're here because we've been indicted because  
2 Mr. Babin doesn't think that it does. Not just some.  
3 Any.

4 And so when we -- we're faced with this as we  
5 were trying to stream, not just *Cuties*, but other movies  
6 that may touch on or resemble *Cuties* in some way -- we  
7 have to make these complex decisions about whether we  
8 want to go through this all again in Tyler County. That  
9 is -- that's the definition of irreparable harm. The  
10 state can't give you a straight answer today, but  
11 they've told one judge when it helped them in Houston  
12 that it does to try to get a conviction for Mr. Lowry.  
13 And then when they -- they need to get a conviction on  
14 Netflix, they'll say it doesn't. That is exactly why  
15 the statute is unconstitutional on its face, and we want  
16 the Court to reach that question.

17 On -- in terms of Younger, it was brought up  
18 that these are jury questions that state court juries  
19 should reach and that bad faith is not present.

20 THE COURT: Hold on a second.

21 MR. BENNETT: Yeah.

22 THE COURT: You want me to rule that 262 is  
23 unconstitutional, but 43.25 -- you're not seeking a  
24 constitutional evaluation of that statute, correct?

25 MR. BENNETT: Yes, we are. Just a different

1 kind. So it's a remedial question. The question is  
2 what remedy -- we get different remedies for our  
3 challenges. The remedy for the 262 challenge is this  
4 Court says no prosecutor in Texas, whether Mr. Babin or  
5 anybody else, can indict anyone for violating 262  
6 because it is unconstitutional in substantially all of  
7 its applications either because it's hopelessly  
8 indeterminate and violates due process, especially  
9 because it chills speech, or because it violates the  
10 First Amendment, as *Lowry* concluded, because it's  
11 substantially overbroad and engages in content-based and  
12 viewpoint-based distinctions that the First Amendment  
13 doesn't permit. So that's A. You can't enforce this  
14 against anyone ever challenged.

15 THE COURT: All right. That's 262.

16 MR. BENNETT: Correct.

17 THE COURT: Go back to 43.25.

18 MR. LINDSEY: In 43.25, our remedy is  
19 different. We are not telling the State of Texas that  
20 it can't pursue 43.25 against actual child pornographers  
21 because we want Texas to pursue real child  
22 pornographers. We're not going to step in the state's  
23 way of doing great public work when they properly use  
24 their resources. What we're saying is, after  
25 recognizing that you have no chance of winning on 262,

1 either because it's unconstitutional or you can't ever  
2 show it appeals -- that the film *Cuties* satisfies the  
3 material elements of appeals to the prurient interest,  
4 for example --

5 THE COURT: Or that it has no artistic  
6 value --

7 MR. BENNETT: Or that it has no artistic  
8 value.

9 THE COURT: Okay.

10 MR. BENNETT: Including -- because the  
11 state's already said so when it served its purposes in a  
12 different case. You want to sweep that under the rug,  
13 avoid federal scrutiny, and now just stick with a  
14 challenge that we -- we have to wait and go through the  
15 entire trial process before we can vindicate our federal  
16 constitutional rights.

17 And I will tell you, if we didn't have all of  
18 the facts that we have in this record, if Mr. Babin had  
19 issued an indictment in October of 2020 for 262 and  
20 two days later came back and indicted us under 43.25, we  
21 would have probably had something to say about it but  
22 not here. Because that's a different story. The cases  
23 overlaid across these facts paint a very distinct  
24 picture. And that's Mr. Babin watched the film in 2020,  
25 thought we violated 262, only 262, charged only 262,

1 mentioned only facts relevant to 262 in his indictment,  
2 and waited 400 days until we showed him the statute was  
3 invalid. And it wasn't until after and because we filed  
4 that challenge to his case suddenly he convenes secretly  
5 his grand jury, and we get four more indictments --  
6 five -- five times more than any prosecutor in America  
7 has brought against Netflix for this film and tries to  
8 get us -- deprive us of our pretrial habeas rights and  
9 all of the rest.

10           Those facts, among the others that we've  
11 cited -- and I don't want to go through them again.  
12 They're certainly in our complaint and in our motion --  
13 justify the relief we seek under Younger, and it doesn't  
14 have anything to do with jury questions. The reason  
15 that we brought up elements -- and I want to make this  
16 distinction because I don't think my friend on the other  
17 side -- he kind of confused these issues. The only  
18 reason why we talk about the merits -- the underlying  
19 merits is because of the issue of probable cause and the  
20 way that overlays bad faith for purposes of Younger.  
21 It's not an issue of jury question.

22           Probable cause is not a jury question.  
23 Probable cause is a due process issue. When state  
24 officials act without probable cause, they violate due  
25 process --

1 THE COURT: That's the Fourteenth Amendment  
2 argument, correct?

3 MR. BENNETT: Exactly. So that's what  
4 happened here. No reasonable prosecutor -- no one who  
5 actually watched this film could have ever thought  
6 43.262 ever could have garnered a conviction. It was  
7 hopeless from the moment the indictment issued. Not  
8 only because of the profound constitutional issues, but  
9 because Mr. Babin was never going to get the proof he  
10 needed to satisfy appeals to the prurient interest or  
11 any of the other things.

12 So that doesn't -- that jury question that  
13 may exist, if there's probable cause, that's not before  
14 the Court. And it doesn't -- the Court doesn't need to  
15 spend any time worrying about that. The only reason  
16 that's implicated in this case is because after  
17 indicting us once under -- without probable cause, we  
18 dealt with that. We were ready to go forward with that  
19 in state court. He changed horses 500 days later  
20 despite having seen the film, despite having every  
21 opportunity to do it before we spent time on the habeas  
22 petition pursuing that, defending that case, and he  
23 chose to wait until after it. And it was because --  
24 there is causation there. And, again, I would submit  
25 *Jordan* and *Torries* to the Court about why those facts

1 preclude any application of Younger.

2           So let's talk about likelihood of success,  
3 harm, and then I want to end on the public interest.  
4 The -- my friend on the other side wants to talk about  
5 unsettled law. Aren't -- whatever issues may be  
6 unsettled in the state court have no bearing on this  
7 Court's jurisdiction or power to adjudicate the claims  
8 we've raised. State court doesn't effect, implicate,  
9 impact this Court's plenary authority over federal  
10 constitutional issues.

11           And the Court can read state law and look at  
12 cases. Certainly, they're informative. Certainly, they  
13 can be persuasive. But at the end of the day, it is  
14 this Court's duty, this Court's power to decide what  
15 federal law is. Not state -- not state courts and  
16 certainly not state court juries.

17           Likelihood of success on the merits. My  
18 friend raised Dost. I want to be clear about why Dost  
19 even matters for purposes of this case. It's only an  
20 interpretive aid. Dost only ever is an interpretive aid  
21 to decide when the catchall in real child pornography  
22 cases, lewd exhibition applies, and whether the material  
23 at issue in those cases amounts to sexual conduct. The  
24 reason we've raised Dost is because it's clear. The  
25 legislature didn't use Dost. Didn't want Dost used.

1 There are two textual clues before you even get to the  
2 legislative history. And that's the fact that the  
3 legislature purposely did not use -- purposely omitted  
4 the phrase "sexual conduct" from anywhere in the  
5 operative elements of Section 262.

6 And the reason that matters and the reason  
7 that implicates Dost is because lewd exhibition in the  
8 sexual conduct sense in 43.25, right, is one thing, but  
9 when you sever lewd exhibition from sexual conduct and  
10 use a different phrase, the canons of construction say  
11 it can't mean the same thing or shouldn't mean the same  
12 thing and thereafter we don't have to worry about Dost.  
13 I guess I'll just correct a couple of things. *Bolles* is  
14 not a 262 case. *Bolles* is a 43.25 case. The *Bolles*  
15 court never construed Section 262 because it's a 2017  
16 case, and it was before 262 was even effective. So the  
17 Court had no opportunity whatsoever to ever opine on  
18 what lewd exhibition meant for purposes of 262.

19 And it certainly hasn't indicated that the  
20 legislature intended, despite all of the evidence to the  
21 contrary, for lewd exhibition to mean the same thing  
22 that it means in 43.25. Again, there are too many  
23 textual clues. There's too much legislative history to  
24 ever reach that conclusion that they're the same  
25 meaning. And in terms of clothing, I thought I was



1 pretty clear, but let me be clearer in case I wasn't.  
2 My friend on the other side seems to suggest  
3 differently. I never said clothing -- the presence of  
4 clothing was dispositive or at least I never intended  
5 to. It's mitigating. And that means it lessens -- it  
6 doesn't necessarily dispose of, but lessens the  
7 likelihood of a finding of sexual conduct. But the  
8 point is -- and this is one of those textual clues about  
9 what lewd exhibition for purposes of 262 means -- when  
10 you have a statute that makes clothing the incriminating  
11 fact, you can't apply Dost. That would otherwise make  
12 it -- right? That conflicts with the legislature's  
13 purpose.

14           The legislature knows about Dost. It knows  
15 it makes clothing a mitigating factor, and yet it uses  
16 clothing as an incriminating factor in a different  
17 statute further cementing the conclusion that Dost can't  
18 apply and lewd exhibition is different.

19           So what I didn't hear ever is any  
20 full-throated defense of 262 as not overbroad or any  
21 defense of Mr. Babin's effort to stretch 43.25 to the  
22 film *Cuties*. That never came up at any point during my  
23 friend on the other side's rebuttal. And that's because  
24 there really isn't any good argument for it. There's  
25 too many cases against it. There's no facts to support

1 it. So likelihood of success on the merits, at least  
2 for purposes of today, weighs completely in Netflix's  
3 favor.

4 I understand concerns about, you know, the  
5 harm, and I want to be clear about that. We've cited  
6 the *Opulent* case to your Honor on Page 36 of our motion  
7 where the Fifth Circuit says expressly, "Even a minute's  
8 loss of a First Amendment right is irreparable harm."  
9 We have certainly more than that here. It's not --  
10 *Google* -- *Google* talked about subpoenas. We have five  
11 indictments -- felony indictments in this case that  
12 we're now operating under the shadow of. One dismissed  
13 but vouched for and never backed away from, and four  
14 currently under a statute that can't possibly apply to  
15 this film. That's far weightier than a request or an  
16 order to provide some documents. Five of them. And,  
17 again, five more than any prosecutor in America has ever  
18 issued.

19 Your Honor just asked about statute of  
20 limitations, and this, again, goes to the harm issue.  
21 That's a weighty issue of -- especially since some of  
22 these are facial issues, right? Because we don't have  
23 to show on a facial challenge that it applies always to  
24 us. The implications -- the First Amendment  
25 violations -- we can talk about First Amendment

1 violations to all people, right? So statute of  
2 limitations -- maybe Mr. Babin's claim is barred in, I  
3 think, six, maybe eight years -- no. For a child  
4 offense, it might be as many as ten in Texas. So he's  
5 got until 2030 -- as long as 2030, I believe, to come  
6 after Netflix again or his successor or whomever else,  
7 but it's ten years for any user. So on the last day of  
8 however long *Cuties* is on Netflix, it's ten years from  
9 that last use that the citizens of Texas have to worry  
10 about Mr. Babin or someone else indicting them for  
11 watching a film that's publicly available and won awards  
12 at film festivals. That -- that can't be the law, and  
13 it's the epitome of irreparable harm.

14           On the issue of the indictments, my friend on  
15 the other side talked about, well, the indictments are  
16 still going to exist. Yes, that's true. But if the  
17 Court acts and enjoins Mr. Babin and, again, all of the  
18 folks that Rule 65(d) touches, there's a lot of pretrial  
19 events still to happen. We understand, and we've been  
20 upfront, candid, and have come honestly that we've made  
21 a big request of the Court, but we've made it because  
22 the facts and the law justify it. And the First  
23 Amendment requires the vindication of those interests.

24           And it's not going to be a speedy decision  
25 even for purposes of a TR0. What we're up against right

1 now is an arraignment, I think, a week from -- two weeks  
2 from this coming Monday. I don't want to have to appear  
3 at that with -- typically, under usual practice under  
4 state law, you've got to show up with the individuals  
5 named in the indictment. They've named my CEO and the  
6 chief content officer. I don't want to have to show up  
7 with Mr. Hastings at an arraignment in Woodville, Texas,  
8 for a charge that should be enjoined under federal law.  
9 Now, we -- in all candor, we could waive arraignment and  
10 enter not guilty like we did the first time -- a plea of  
11 not guilty, but we shouldn't have to do that because it  
12 never should have happened to begin with. And this  
13 Court can decide that -- the as-applied constitutional  
14 nature --

15 THE COURT: Well, if the TRO were granted for  
16 14 days, then that would stop that arraignment process  
17 at least that long. There's been a lot of talk about  
18 having enough time to absorb everything. These are  
19 serious issues for the Court to decide and -- on many  
20 different levels. I mean -- and without making any  
21 comment on the merits, the Court certainly sees the  
22 damage that child pornography causes. This Court, as  
23 well as virtually every other federal district court in  
24 the country, reads the victim's statements when  
25 convicting and sending someone to prison for a

1 conviction of child pornography. And this Court has  
2 seen how preying on children, even to the point of  
3 wanting to cannibalize children after sexual conduct,  
4 and children can get lured into these situations through  
5 the use of social media and what have you. It's very  
6 dangerous. And the Court certainly understands the good  
7 natured intent of the legislature to try to curb these  
8 abuses by passing statutes that they think are in the  
9 best interest.

10 And for that matter, the actions of a  
11 district attorney wants to utilize those statutory tools  
12 to try to curb the abuse of children in this way, and  
13 many people of good intent who want to restore a sense  
14 of values and decency and all would actually applaud  
15 Mr. Babin for taking steps to end, stop child  
16 pornography, but -- so that's -- I can understand --  
17 although Mr. Babin only spoke briefly -- but I can  
18 understand his desire to try to do what he feels is  
19 right. I can understand the desire of the members of  
20 the legislature to try to do what they think is right.  
21 But ultimately on the other hand, we do have the  
22 constitutional right of freedom of expression. And  
23 there is some very weighty issues here that the Court is  
24 going to have to work through.

25 And, you know, 14 days, given the Court's

1 schedule -- other trials -- you know, to even really  
2 give this for both sides the kind of proper evaluation  
3 that it needs, you know, in -- it may take 14 days to  
4 even get to that point. But I suppose at least a  
5 temporary restraining order, assuming the Court feels  
6 that you've met the threshold requirements, would at  
7 least kick the can down the road without your CEO or  
8 other top executives having to appear in court for an  
9 arraignment. Although you might do it in another way.

10 I suppose, frankly, that -- I don't know that  
11 even the state would object too much to kicking the can  
12 down the road for 14 days. After all, it kind of held  
13 the claims for 400 days. I mean, these are very  
14 serious -- this is a very serious case for both sides.  
15 You're talking about the unconstitutionality of a  
16 statute. Well, a lot of good natured people came  
17 together in Austin to try to come to some sort of  
18 statute to try to curb what is a very major problem in  
19 the state. And people can be victimized. Ironically,  
20 if what I've read in some of the pleadings, the actual  
21 producer of this movie was, in a sense, in agreement  
22 with Mr. Babin that this is such a problem in the world  
23 today that this movie was an attempt to try to curb  
24 those abuses. It's kind of an irony of sorts.

25 And, again, perhaps, you would probably argue

1 that's the political merit of the case, value of the  
2 case. So this is -- this is a -- in many ways, it  
3 almost seems to the Court that the producer of this  
4 movie and Mr. Babin are on the same page. It's just how  
5 you express that might be what is difficult. So I don't  
6 know. I'm just curious about my comment, and I'd ask --  
7 not to interrupt your -- I'm just curious, Mr. Lindsey,  
8 about what I just said.

9 MR. LINDSEY: Could I have a couple of  
10 minutes to speak with Mr. Babin?

11 THE COURT: You may. Do you want to be in  
12 recess or just take --

13 MR. LINDSEY: Yes, sir.

14 THE COURT: Before you do that, do you want  
15 to complete -- come to a conclusion?

16 MR. BENNETT: Based on your Honor's remark, I  
17 just have a couple quick points because -- and I think  
18 these dovetail together -- your remarks would be where I  
19 finished.

20 And your Honor's concerns about  
21 this difficult balance, I think, is expressed best in  
22 Chief Justice Robert's opinion in *U.S. v. Stevens*.  
23 People can have well-intended desires to protect  
24 children. In the *Stevens* case, it was animals. But at  
25 some -- at some point, as your Honor mentioned, the

1 desire to protect can't override or invade what is  
2 otherwise protected. And that's where *Stevens* ran into  
3 trouble. And whatever the legislature's good  
4 intentions -- which we're not here to question in 262 --  
5 it transcended that -- that balance -- the balance that  
6 is mentioned in *Stevens*. And so we commend the Court --  
7 that opinion of the Court sort of wrestles with those  
8 issues.

9 But that dovetails in with the last point  
10 that I want to make and that my friend on the other side  
11 made. What about the state's prosecutors? What message  
12 does it send to them? I would submit to your Honor it  
13 won't send any message to them other than that this case  
14 is the outlier that the record shows that it is.  
15 Certainly, we were ready, and we could appreciate a new  
16 statute that Mr. Babin raised in the first indictment.  
17 And we were ready to go to state court on that, but the  
18 record shows what it shows and that it was less about  
19 testing new theories and new ways and more about making  
20 sure Netflix answers for exercising its First Amendment  
21 rights. Not just of free speech, but to petition for  
22 redress in the petition.

23 And at that point, it turned into something  
24 else. Five-hundred days after indicting under the first  
25 indictment, bringing all these new charges -- again, I



1 think the biggest factor that weighs against any -- any  
2 notion that your Honor's action in this case would  
3 affect the state's prosecutors in any way is, A, the  
4 state's expressed disclaimer in another case that  
5 Netflix doesn't -- not only is it -- that it doesn't  
6 violate the statute at all, but also that Mr. Babin is  
7 the only -- out of 241 district attorneys and however  
8 many state attorney generals and assistant attorney  
9 generals there are, he's the only one to do what he did.  
10 Not just do what he did in terms of indictment, but do  
11 what he did in terms of what the record shows he's done.

12 THE COURT: Okay.

13 MR. BENNETT: So it won't affect -- it's in  
14 the public's interest. We'd ask the Court to issue the  
15 TR0 that will last 14 days from whenever the Court's  
16 order comes out, being mindful of the arraignment issues  
17 we've addressed, the plea that we're going to have to  
18 enter by whatever means --

19 THE COURT: Which is a week from this coming  
20 Monday? Is that what you said?

21 MR. BENNETT: Correct. Or it might be the  
22 following. I can double check my calendar. I think it  
23 is actually -- now that I think about it, not two weeks  
24 from this Monday, but it'd be three weeks.

25 THE COURT: I think it's -- well --

1 MR. BENNETT: For all those reasons --

2 THE COURT: It's very important that we get  
3 this right.

4 MR. BENNETT: We agree.

5 THE COURT: And I typically have been in  
6 other situations somewhat liberal when it comes to  
7 granting a temporary restraining order, I mean, unless  
8 massive financial issues are at stake, and then we have  
9 to have bonding for that. But we understand. But, you  
10 know, at some point, it's like a 14-day cooling off  
11 period until everybody can kind of sort through  
12 everything and give a more orderly presentation with  
13 both sides present. Here we kind of had -- although --  
14 albeit, I saw where you mentioned that you got the  
15 notice of this late yesterday.

16 Most of the time when I'm in a TRO, the other  
17 side didn't even know it had happened until they  
18 received the restraining order. But I understand that's  
19 because under the federal rules, you had to notify the  
20 attorney general since the constitutionality of a  
21 statute was in effect. So -- which I appreciate you  
22 doing.

23 All right. There was a request for a brief  
24 recess for the defendant to kind of regroup.

25 MR. LINDSEY: Yes, your Honor.

1 THE COURT: And -- would five minutes be  
2 sufficient?

3 MR. LINDSEY: I believe so.

4 THE COURT: I'll give you five minutes.  
5 We stand in recess.

6 (A recess was taken at this time.)

7 THE COURT: Please be seated.

8 Yes, Mr. Lindsey.

9 MR. LINDSEY: Your Honor, I think that we  
10 have come to a mutually agreeable solution at least for  
11 the meantime, if the Court will agree.

12 THE COURT: For purposes of, like, a  
13 temporary restraining order?

14 MR. LINDSEY: Yes, your Honor.

15 THE COURT: Okay. But not the full case; is  
16 that correct?

17 MR. PRICHARD: Correct.

18 MR. LINDSEY: Correct. If I understand  
19 correctly, Netflix is going to agree to take down the  
20 request for temporary restraining order in exchange for  
21 us in the future -- the near future agreeing on a date  
22 to set the final hearing.

23 And in the meantime, Mr. Babin will  
24 informally commit not to arraign Netflix.

25 MR. PRICHARD: But I think it's about

1 95 percent correct. I think the term that I used with  
2 counsel was an agreed stay of any proceedings so that we  
3 would get outside of the strictures of the temporary  
4 restraining order 14 days to give both sides more  
5 opportunity to brief, maybe to discuss --

6 THE COURT: Depending on whatever evidence  
7 you have?

8 MR. PRICHARD: And then we wouldn't have to  
9 just come back just in 14 days. Maybe we could find --  
10 hopefully, with reasonable people, find a reasonable  
11 resolution, so that we would not have to see the Court  
12 again.

13 But if we did, we have agreed to sometime  
14 around the mid-May portion for a temporary injunction  
15 hearing, if necessary.

16 THE COURT: Right. Well, I think that's  
17 admirable. I do want to just let -- what I tell all  
18 litigants. I don't ever want to force anyone into any  
19 sort of a settlement, and I'm not. By the same token,  
20 I'm not going to stand in the way of people, you know,  
21 trying to come to some resolution.

22 My concern is since the issues are pretty  
23 involved, shall we say, I want to make sure I get it  
24 right. And -- because that doesn't really --  
25 ultimately, I make a decision. One side or the other

1 may take it up. But I want it to go up -- if it goes  
2 up, certainly with my best efforts on the table and a  
3 proper evaluation. And it's hard to do that in 14 days.  
4 It's hard to properly develop and respond. Of course,  
5 under this, it sounds like Netflix, at least, gets a  
6 reprieve for a while. At least probably until the  
7 middle of May.

8           And then, you know, I was kind of asking,  
9 well, what are we going to do when we meet again in  
10 14 days or if we were to extend it another 14 to  
11 28 days. We would be kind of here again, and we could  
12 get it all knocked out in one -- I think I have the gist  
13 of it. We will obviously have great interest in this.  
14 And with the materials that you've provided us -- both  
15 sides -- I know you'll probably supplement in time for  
16 the final hearing. Because really you wouldn't need, it  
17 seems to me -- obviously, I'd want to hear otherwise --  
18 a need for us to have a hearing on a preliminary  
19 injunction and then come back a year later on yet a  
20 permanent injunction or anything like that. I think --  
21 I think we -- if we could deal with it at one time, it  
22 would probably be wise. It would probably be wise. But  
23 then, at least, Netflix, from what I'm hearing, is, at  
24 least, protected in the -- in the short term; is that  
25 correct?

1 MR. PRICHARD: That's my understanding. I  
2 think we've reached that agreement.

3 MR. LINDSEY: Yes, sir.

4 THE COURT: Now, there is also many a slip  
5 between the cup and the lip, as you know. And I'm sure  
6 you all will have some written agreement to this effect  
7 that you all will sign?

8 MR. PRICHARD: We will endeavor to do that.  
9 We'll take the first cut, if you'd like.

10 MR. LINDSEY: By all means.

11 MR. PRICHARD: Okay. I figured that might --

12 THE COURT: And in the event that committing  
13 it to paper is not successful --

14 Mr. Lindsey, you have authority on behalf of  
15 the attorney general's office? I mean, do you need to  
16 discuss it with people back at the home office?

17 MR. LINDSEY: Actually, my understanding is  
18 now that I've been deputized as a Tyler County special  
19 prosecutor for this matter. So I have all of the  
20 authority.

21 THE COURT: Well, congratulations to you.

22 MR. LINDSEY: It was a very formal ceremony.

23 THE COURT: Yes.

24 MR. PRICHARD: Badge and all that good stuff?

25 MR. LINDSEY: I'm working on that.

1 THE COURT: So you -- okay. You can enter  
2 this agreement?

3 MR. LINDSEY: Yes.

4 THE COURT: You don't have to get the  
5 attorney general to bless it or anything like that?

6 MR. LINDSEY: Correct.

7 THE COURT: Okay. Well, I suppose if there  
8 is some sort of a problem, you all let the Court know.  
9 I will -- do you all want to agree -- since we're all  
10 here today, can y'all agree on a date? We have to look  
11 at our schedule, too, or do you want to --

12 MR. BENNETT: So if I can -- if that's all  
13 right -- I think what I heard your Honor say is we want  
14 to do it one time.

15 Rule 65(a) permits for that, a consolidation  
16 of a preliminary injunction hearing and --

17 THE COURT: That's right. We've done it.

18 MR. BENNETT: -- a permanent injunction  
19 hearing. I think it just creates some tricky issues,  
20 but I think maybe we could explore that. So we have  
21 this interim agreement --

22 THE COURT: Because what else would we --  
23 would happen?

24 MR. BENNETT: Right. I think that's --  
25 that's right. The only -- it's that 2 percent issue I

1 alluded to earlier, but I think we can have some  
2 conversations about that. Are there facts? I mean,  
3 there has been some assertions about evidence and bad  
4 faith. We think there's ample evidence already, but --  
5 anyway, there might be some other issues to talk  
6 through.

7           So my suggestion would be we -- I'm glad we  
8 have this order or this agreement. We'll get that in.  
9 Again, if there's a problem, we'll come back. I don't  
10 anticipate there will be. And then --

11           THE COURT: You don't anticipate there'll be  
12 a problem in reaching the agreement?

13           MR. BENNETT: I don't anticipate there'll be  
14 a problem reaching the agreement for the interim  
15 purposes.

16           THE COURT: That's what I thought -- that's  
17 what I thought you said. Go ahead.

18           MR. BENNETT: I'm a little tongue tied after  
19 having talked as much as I have. I might have said it  
20 wrong.

21           Yes. To be clear, I think we're in  
22 agreement. We'll paper that over and get an order to  
23 your Honor. If there's an issue, we'll talk. I do not  
24 think there will be. And then we could have further  
25 conversations about this -- the Rule 65(a.) What do we



1 want to do about that. We can reach further agreements.  
2 If it's not going to be -- obviously, some of that is  
3 going to depend on your Honor's calendar to get us --  
4 how much time do we need and -- so I guess all that to  
5 say, we got the temporary problem solved. Let us as  
6 lawyers go to work and try to reach some agreements to  
7 make it efficient for everybody. I think we can do  
8 that. So that would be my suggestion.

9 Obviously, we need to do formal service and  
10 sort of initiate some of these Rule 16(b) kind of  
11 procedures, you know, but that would be my preference at  
12 least for Netflix.

13 THE COURT: Is there any discovery that you  
14 all are wanting to engage in between now and the final  
15 hearing?

16 MR. BENNETT: I don't want to say no,  
17 absolutely not --

18 THE COURT: Okay.

19 MR. BENNETT: -- only because of this bad  
20 faith issue. I don't know what their position is going  
21 to be on some of this. Some of that may require some  
22 development. It may come through briefing. I don't  
23 think there will be discovery. I just don't want to  
24 commit and say absolutely not right now.

25 THE COURT: Hold on just a minute.

1           We won't set it yet, but May 23rd appears to  
2 be open on the Court's calendar. For those of you -- I  
3 think this is the first time you all have ever appeared  
4 in front of me. I may be a little different than a lot  
5 of federal judges because I was a trial lawyer for  
6 34 years. I'd like to say -- give you what's convenient  
7 for the Court, but it's still -- when it comes to  
8 scheduling, as long as there aren't any critical issues  
9 that are affected by it, it's the lawyers' case. It's  
10 not my case.

11           And I include -- May 23rd is a time of high  
12 school and college graduations and things like that.  
13 Even weddings and things. If you have any personal  
14 issues as well as professional, I'd kind of like to --  
15 we work around things like that.

16           When I was a trial lawyer, I had many  
17 vacations destroyed by judges who just didn't seem to  
18 understand. So I try to work with people on that.

19           Mr. Prichard.

20           MR. PRICHARD: I will let the Court know that  
21 I have a week-and-a-half, at least, engagement with  
22 Judge Schroeder up in Texarkana.

23           THE COURT: When does that start?

24           MR. PRICHARD: May 23.

25           THE COURT: Okay. We will honor that.

1 MR. PRICHARD: There's a lot going on in that  
2 case, and it may -- it's been continued now five times.  
3 And Judge Schroeder, I don't think, is going to take too  
4 kindly, but there are a lot of issues that he's not  
5 going to be very happy about to continue it again. So I  
6 want to let the Court know. But let me say this: I'm  
7 working for my friend Mr. Bennett. And if that's the  
8 date that's agreed upon and works for everybody, I will  
9 do my best or he'll have a fill-in for me. So I don't  
10 want to say no to a date because that date might be just  
11 perfect for everybody else.

12 THE COURT: I understand.

13 MR. PRICHARD: I'm a "low on the totem pole"  
14 participant.

15 THE COURT: I wouldn't say that. And your  
16 comments are very helpful to the process, and I  
17 appreciate it. So maybe we need to look for another  
18 date.

19 Yes, Mr. Lindsey.

20 MR. LINDSEY: I was just going to say the  
21 23rd is convenient for us, but if we're looking for  
22 another day --

23 THE COURT: All right.

24 MR. LINDSEY: -- belay that.

25 THE COURT: Mr. Bennett.

1 MR. BENNETT: I have to check. Obviously,  
2 with some of the unknowns with my office and -- we have  
3 a trial thereabouts and maybe pretrial --

4 THE COURT: As an alternative, Tuesday,  
5 June 14th. I think the Court could give that to you.

6 Is that a little better, Mr. Prichard?

7 MR. PRICHARD: Yes, your Honor. And it's all  
8 right with our client.

9 Is it all right with you, Mr. Bennett?

10 MR. BENNETT: I'll make it work.

11 MR. LINDSEY: Was it the 13th or 14th?

12 THE COURT: 14th.

13 MR. LINDSEY: It's convenient for us, your  
14 Honor.

15 THE COURT: All right. I think that would be  
16 better than -- if that's all right with the parties. It  
17 extends this agreement another month. But -- and that  
18 way we don't have to interfere with your other schedules  
19 and what have you. And that's fine.

20 What else do we need to take care of today?

21 MR. PRICHARD: What time would the Court like  
22 us --

23 THE COURT: Well, we could go ahead and start  
24 at 9:00. I think that would be fine. It sounds like  
25 you guys -- one of the things -- I went ahead and

1 started at 10:00, and we went a little bit beyond that  
2 because we received so many materials late and into the  
3 night and early morning that I didn't want to start at  
4 9:00 without at least -- at least a cursory review of  
5 what the case was about before presiding over this  
6 hearing.

7 Obviously, the Court will be better prepared  
8 on the 14th. And I knew people were coming in, and I  
9 just wanted to give everybody a little more time. So --  
10 but if -- y'all will probably come in the night before  
11 anyway, so we might as well get a full day.

12 Now, this is a Lufkin case. We like trying  
13 cases and having cases in Lufkin. But since we won't  
14 have a jury involved, I don't think there's really an  
15 issue of anybody waiving an opportunity to have a Lufkin  
16 division jury decide anything at this. So would you all  
17 agree to just do it in Beaumont? And that would save --  
18 save the Court -- not just me. I don't care. But we  
19 have to bring other people up from Beaumont to man the  
20 courthouse there.

21 MR. PRICHARD: We waive any right to be in  
22 Lufkin and agree to do it in Beaumont, your Honor, on  
23 behalf of Netflix.

24 THE COURT: Now, obviously, if there's ever a  
25 fact issue that required a jury, we would, absent an

1 agreement of the party -- and even that has some  
2 implications of our ability to do it -- we would go  
3 ahead and have any kind of a jury trial. Now, I don't  
4 think that's an issue here, but we would do that in  
5 Lufkin.

6 For a hearing, are you okay with Beaumont?

7 MR. LINDSEY: Yes, sir.

8 THE COURT: Okay. All right. Anything else?

9 Well, let me know for sure that you've  
10 reached an agreement. We're going to hold June 14th for  
11 you.

12 And with that being said, we'll stand  
13 adjourned.

14 (Proceedings adjourned at 1:41 p.m.)

15 \* \* \*

16  
17 COURT REPORTER'S CERTIFICATION.

18 I hereby certify that on this date,  
19 March 25, 2022, the foregoing is a correct transcript of  
20 the record of proceedings in the above-entitled case.

21  
22   
23 APRIL D. HARGETT  
24 Certified Realtime Reporter  
25 Eastern District of Texas  
Beaumont, Texas